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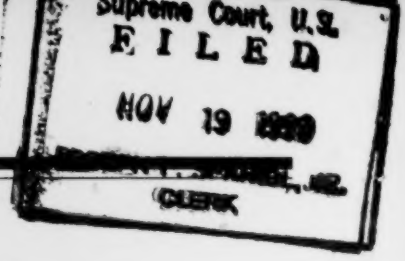

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

POCONO GREEN, INC.,
Petitioner

vs.

BOARD OF SUPERVISORS OF KIDDER TOWNSHIP
(Carbon County), PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Whether the Board of Supervisors of Kidder Township (Carbon County), Pennsylvania and the Supreme Court of Pennsylvania, respectively, denied preliminary approval of Petitioner's housing development based upon statements not in evidence nor part of the record, in violation of the Fourteenth Amendment to the United States Constitution.

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BOARD OF SUPERVISORS OF KIDDER TOWNSHIP
(Carbon County), PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, Pocono Green, Inc., by and through its counsel, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App., *infra*, 1a - 11a) is reported at 523 Pa. 601 and 568 A.2d 612. The opinion of the Commonwealth Court of Pennsylvania (App., *infra*, 27a - 29a) is reported at 117 Pa. Commonwealth 396 and 543 A.2d 1253. The opinion of the Court of Common Pleas or Carbon County is not reported. The Report of the Supervisors of Kidder Township is not reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (App., *infra*, 1a) was entered on January 16, 1990. An Application for Reargument was denied on August 22, 1990 (App., *infra*, 26a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law...

STATEMENT OF FACTS AND APPLICABLE LAW

The issue in this case is whether the state can deny a property owner the right to use his land in a manner consistent with applicable zoning regulations without affording him the safeguards of Procedural Due Process. This right is important and fundamental--too important and fundamental to be defeated by unsupported and insupportable fears of adverse impact. Yet, precisely this occurred with Petitioner's land development application to the Board of Supervisors of Kidder Township.

The Kidder Township Board of Supervisors reached an incorrect conclusion because it relied upon public opinion rather than competent evidence. Procedural Due Process provides safeguards which insure that government decisions affecting individuals are fair and accurate, not arbitrary or irrational. When government agencies stray from the structural framework of Procedural Due Process, errors are committed and rights protected by the Fourteenth Amendment are abridged.

Procedural Due Process requires that decisions regarding reasonable land use be made objectively and without hysteria. This Court has never instructed local zoning agencies to comport their actions to the Procedural Due Process requirements of the Fourteenth Amendment. The Court should issue a definitive statement that local governments must adhere to the requirements of Procedural Due Process in applying zoning ordinances to individual properties. This will safeguard against the denial of legitimate land use, based on irrational public sentiment and without regard for the rights of property owners or the larger needs of society.

I. Statement of Facts.

The Petitioner ("Pocono Green") is a real estate developer. In 1985, Pocono Green proposed a planned residential development of 465 dwellings on a tract of land partially located in Kidder Township, Carbon County, Pennsylvania. Pursuant to applicable state law and municipal ordinance, Pocono Green submitted to Kidder Township its Planned Unit Development[1] for Tentative Approval[2] of the 200 dwellings to be located in the Kidder Township portion of the tract.

Pennsylvania law provides that the municipal legislative body may assign consideration of planned developments to an independent administrative agency (generally called a "Planning Commission"). Alternatively, the municipal board may opt to review the development plans itself. Kidder Township has opted for the latter procedure. Accordingly, a public hearing on Petitioner's Planned Unit Development was held before the Board of Supervisors of Kidder Township. At the public hearing, Pocono Green presented exhibits and the sworn testimony of several witnesses, including a professional engineer. After the public hearing the Township Board of Supervisors issued a written decision, denying Tentative Approval of the Planned Unit Development.

The denial of Tentative Approval was based solely upon the Supervisors' conclusion that Pocono Green's plans for sewage

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[1] Planned developments (sometimes called "Planned Unit Developments" or "Planned Residential Developments") are a housing development model gaining increasing popularity for the construction of affordable housing. By clustering the housing units, thereby minimizing the expense of roads, sidewalks, and utilities, this type of development provides entry level housing for middle and working class families in a more aesthetically pleasant and environmentally sound manner than conventional residential development.

[2] Tentative Approval is a preliminary approval of the design scheme, critical under the Pennsylvania Municipalities Planning Code, 53 P.S. Section 1001, *et. seq.* The Tentative Approval process allows a review of the development plans for conformity to state and local land use regulations. Without Tentative Approval, the development may not proceed under Pennsylvania law. As a practical matter, also, Tentative Approval is generally necessary to secure financing for the actual construction of the Planned Unit Development. Tentative Approval was granted by the adjoining East Side Borough for the remaining 265 dwellings on December 5, 1985.

treatment were not feasible[3]. This conclusion resulted entirely from the Board's finding of fact that the stream into which Pocono Green proposed to discharge the treated wastewater processed by its sewage treatment plant (i) ran dry and (ii) emptied into a pond with no outlet. The record made before the Board contains no competent evidence to support these findings.[4]

At the public hearing, two residents of Kidder Township, who were not sworn as witnesses, asked questions of Pocono Green's engineer. While asking those questions, the residents made unsolicited comments from the floor of the public hearing, to the effect that the stream ran dry and that it emptied into a pond that had no outlet. Regardless of the truth or falsity of the unsworn statements, the Board should not have relied on them to reach its decision, because the statements were not part of the sworn testimony and were not subject to cross-examination.[5]

Nevertheless, the Board seized on these statements to

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[3]Initially, the developer has the burden to show that the sewage treatment design is feasible, 53 Pa.C.S. Section 10707(4). Feasibility, for purposes of Tentative Approval, is established by meeting the objective standards of the Ordinance and the enabling legislation, *Doran Investments v. Muhlenberg Township*, 309 A.2d 450, 10 Pa. Cmwlth. 143 (1973). The only objective standards in the Ordinance regarding sewage treatment are requirements of compliance with the Pennsylvania Department of Environmental Resources ("DER") standards and preliminary approval by DER. The *Report on Sewage and Water Facilities* prepared by Petitioner's engineer, the testimony of Petitioner's engineer, and the preliminary approval of the proposed treatment system by the Pennsylvania Department of Environmental Resources, all of which are part of the record, satisfied the objective requirements of the Ordinance and the enabling legislation. See, *Appeal of Molnar*, 441 A.2d 487, 64 Pa. Cmwlth. 515 (1982). When the developer meets these objective standards, the burden shifts to the objectors to show a lack of feasibility. See, *Bray v. Zoning Board of Adjustment*, 410 A. 2d 909, 48 Pa.Cmwlth. 523 (1980).

[4] See, Dissenting Opinion of Justice Larsen (App., infra, 9a-11a)

[5]This critical flaw is not merely an academic procedural deficiency. The Pennsylvania Supreme Court took the extraordinary step of seizing upon these same unsworn statements in supporting its decision. In its Application to the Pennsylvania Supreme Court seeking Reargument, Petitioner attached thereto the applicable United States Geological Survey map and an affidavit of a professional engineer, with accompanying photographs, showing that the stream in question flowed to an impoundment (commonly known as a "pond") created by a railroad embankment, through a concrete culvert, and then into the Lehigh River. The unsworn statements as to the stream's terminus were, in fact, false statements.

deny approval to the development. The Board stated:

> The evidence before the Board of Supervisors is sufficiently deficient in showing the feasibility of the proposed sanitary waste disposal system being a stream discharge treatment plant. A proposed system *which discharges into a stream which often runs dry and leads to a pond with no discharge point* is detrimental to the environment, the immediate residents of the area and all residents of Kidder Township in general (App., *infra*, 49a)(emphasis added).[6]

In making the finding that the stream ran dry and ran to a pond with no outlet, the Board of Supervisors confused the legislative role it normally occupies with the administrative role it exercises in reviewing land development projects. It is acceptable for a legislative body to rely upon public comment in drafting ordinances. However, when exercising its administrative functions, the Board may not rely on the kind of unproven, and ultimately false, statements that were made by the residents from the floor of the public hearing. Procedural Due Process requires the Board to limit itself to competent, sworn testimony and properly authenticated evidence. Here the Board erred fundamentally. It was swayed by the unsworn, erroneous comments of two residents, denying the Petitioner Procedural Due Process.

Pursuant to the procedural requirements of Pennsylvania law, Pocono Green sought review from the Court of Common Pleas of Carbon County, Pennsylvania. The Court of Common Pleas affirmed the Supervisors' denial of approval for the development without addressing the issue of the unsworn statements from the

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[6]The Board of Supervisors has made much of the comments of Petitioner's engineer in response to the unproven scenario painted by the objectors to the effect that the stream runs dry and ends in a pond with no outlet. These comments of the engineer in no way refute the record proof of the feasibility of the sewage treatment system. The finding of the Township and the Supreme Court of Pennsylvania that the planned sewage treatment system would be detrimental to public health, safety, and welfare necessarily depends on findings of "fact" that are unsupported by any evidence in the record.

residents.[7]

Pocono Green appealed the decision of the Court of Common Pleas to the Commonwealth Court of Pennsylvania and prevailed. The Commonwealth Court ordered that the development be granted Tentative Approval, holding that the Supervisors abused their discretion by relying on the lay testimony of the two residents. The Supreme Court of Pennsylvania agreed to review the Commonwealth Court's decision and, in a 3-to-2 decision, reversed the Commonwealth Court.

The Supreme Court of Pennsylvania relied on the finding that the sewage treatment plant would discharge into a stream that ran dry and ended in a pond with no outlet:

> *It should go without saying*, however, that when a developer has proposed a sewage treatment plant unsupported by substantial evidence demonstrating the feasibility of dumping treated sewage *into a stream that runs dry, ending in a pond with no outlet*, the public interest is at risk, the physical design of the proposal is deficient, the manner of deficiency of public service is obvious, and the relationship to the neighborhood is adverse." (App., *infra*, 9a). (Emphasis added).

The Supreme Court of Pennsylvania fell prey to the false, unsworn statements from the residents and declined to reconsider its decision (App., infra, 26a.). The Pennsylvania Supreme Court committed two fundamental errors. First, it adopted the finding that the stream ran dry and emptied into a pond with no outlet. This finding is unsupported by competent evidence on the record. Second, the Pennsylvania Supreme Court, after accepting as fact the unsworn assertions of the objectors that the stream in question runs dry and flows to a pond with no outlet, *made its own finding* that Petitioner's planned sewage treatment sys-

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[7]The Court of Common Pleas stated: "The Developer [Pocono Green] contends that the Board erroneously relied on incompetent "testimony" from two area residents who attended the meeting and questioned [Pocono Green's engineer] about the creek and pond. However, we need not reach any issue regarding the testimonial competence of the questions posed to the engineer by the residents because it is not necessary to our disposition here." (App, *infra*, 35a)

tem would create a risk to the public interest. Nothing in the record, competent or otherwise, supports this latter finding. In fact, all the evidence in the record positively contradicts these two findings.

The Pennsylvania Supreme Court also failed to address the procedural standards that must apply when the municipality exercises its administrative role. By failing to correct Kidder Township's use of legislative fact-finding standards in an administrative context, the court implicitly sanctioned such a process. Such a procedure allows municipalities virtually unlimited discretion to determine which housing projects are to be built and the power to control who gains the right to enter communities. Such a procedure violates the Due Process Clause of the Fourteenth Amendment.

II. Statement of Law.

The decision of the Pennsylvania Supreme Court allows irrational, unsubstantiated fears to guide and direct the zoning agency's review of residential development projects. Decisions based on fears rather than facts are arbitrary and unconstitutional. The judgment of the Supreme Court of Pennsylvania denies Pocono Green due process of law because the decision necessarily rests upon material not in evidence and not part of the record before that court.

The United States Supreme Court has long held that zoning ordinances are constitutional unless the provisions of the ordinance "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, and general welfare", *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). It is settled law that a municipality may not enact a zoning ordinance that is arbitrary or unrelated to the preservation of public health, safety, welfare or morals. However, the Court has left a gap in the legal process that should protect the landowner's right to use his land in conformity with the zoning ordinance. This Court has not established the procedural standards that are required to insure that a municipality's application of an otherwise constitutional zoning or land use ordinance to a particular landowner does not become arbitrary or is not motivated by purposes unrelated to legitimate governmental interests. The states and the federal courts lack guidance on the application of the requirements of Procedural Due

Process to the administrative and adjudicatory actions of zoning agencies.

In the present case, the Supreme Court of Pennsylvania failed to apply a fundamental tenet of Procedural Due Process (that the government's decision be based on competent evidence in the record) to the actions of the municipality. This case presents this Court with the opportunity to define, for the first time, the procedural requirements the Due Process Clause of the Fourteenth Amendment imposes on the application of zoning ordinances to individual landowners and properties.

A. Validity of Ordinances -- Substantive Due Process

Since *Village of Euclid v. Ambler Realty Co., supra.*, and *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928) it has been clear that state regulation of land use is limited by the Due Process Clause of the Fourteenth Amendment, but that land use regulation is permitted if it is reasonably related to a legitimate governmental interest.[8] Zoning ordinances and land development regulations are presumptively valid so long so they are related to public health, safety, morals and general welfare. This application of these Substantive Due Process elements of the Due Process Clause is well integrated into the decisions of the Circuits and the state courts.

The Court's initial decisions in the area of zoning dealt with the validity of the ordinances generally. The adoption of the zoning ordinance is a quasi-legislative function. The Court analyzed the ordinances for their reasonableness and relationship to the legitimate governmental purposes of protecting public health, safety, welfare and morals. No Procedural Due Process requirements attend this legislative function, *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915). The right to Procedural Due Process in a legislative context would make government unworkable. It is not necessary to provide a hearing to all persons who might be affected by a general enactment of a body with the authority to legislate. The protections against improper action of the legislating body are in judicial review under the principals of Substantive Due Process and through the power to vote officials out of office.

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[8] See also, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974).

The Court's decisions regarding zoning have focused on a review of the legislative function of the zoning authority.

However, a zoning ordinance that is reasonably related to a legitimate governmental interest, and therefore valid on its face, must be applied to particular properties and landowners in a manner which is not arbitrary and which is related to a legitimate governmental interest. The zoning regulation must be applied in a manner which satisfies the Procedural Due Process requirements of the Fourteenth Amendment. In the application of the ordinance to particular development plans, the role of the municipal zoning authority shifts from legislative to judicial and administrative. When the zoning authority takes on this quasi-judicial role, the legislative immunity from Procedural Due Process is removed and the concepts of Procedural Due Process must be applied to insure fair and correct application of the zoning ordinance to property owners.

B. Administrative Action -- Procedural Due Process

In the 1970s the Court articulated the application of Procedural Due Process to a variety of governmental actions affecting liberty and property interests. The Court has identified several elements of Procedural Due Process: (1) notice of the governmental action; (2) a neutral decision-maker; (3) an opportunity to present evidence; (4) an opportunity to cross-examine witnesses; (5) a decision based on the record with a statement of reasons for the decision.[9] Furthermore, the evidence upon which the decision is based must be competent and believable. Therefore, oral testimony is generally required to be given under oath, thereby impressing upon the witness his obligation to speak truthfully.[10] The Court has applied the concepts of Procedural Due

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[9] See, generally, *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972)

[10] *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945) (Testimony in administrative proceedings affecting important rights must be under oath to be considered by the decision-maker). See, also *Flick v. Gately*, 328 Ill. App. 132, 65 N.E. 2d 81 (1946) (evidence in a zoning case).

Process to a variety of situations[11], but not to the application of zoning or land use ordinances to individual landowners.

Nor has the Court addressed clearly this distinction between the legislative role of the municipal zoning authority and its judicial and administrative functions. Members of the Court have expressed differing views on when the zoning agency crosses over from legislating to adjudicating, but the Court has not addressed this issue directly. In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed. 2d 132 (1976) the Court reviewed a zoning ordinance of the City of Eastlake. The ordinance provided for all changes in zoning classification to be ratified by a referendum vote. A 55% majority of the votes cast was needed for approval. The analysis of the majority of the Court rested on the assumption that the reclassification of zoning was still within the sphere of legislative action. Therefore, no Procedural Due Process protections attached to the referendum process. In separate dissents, Justice Powell and Justices Stevens and Brennan argued that an application of the zoning ordinance to a particular property and landowner shifted the function of the zoning authority to judicial and administrative, thereby requiring Procedural Due Process safeguards to prevent an abuse of individual property rights.

However, the bulk of the zoning agency's work, including the application of the ordinance in the present case, is clearly within the adjudicatory function of the zoning authority. The Petitioner sought approval for a planned residential development, a permitted use of land under the ordinance. No zoning reclassification was sought. The Board of Supervisors' role was only to determine whether Petitioner's plans conformed to the requirements of the ordinance. This action, representative of the work assigned to the zoning authorities in applying ordinances to particular projects and properties, requires the exercise of administrative functions. Yet no standards exist to guide the states and the circuits in determining when Procedural Due Process protections apply to zoning board actions, nor what level of process is due. The result is a vacuum out of which have developed broad divi-

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11 *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) (tenure of faculty); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed. 2d 656 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972) (parole revocation); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (welfare benefits).

sions out of which have developed broad divisions among the states and circuits, uneven application of constitutionally protected rights, and uncertainty among the builders of housing that they will receive a fair and objective review of their plans by the local zoning agencies.

REASONS FOR GRANTING THE PETITION

This Court should review the decision of the Supreme Court of Pennsylvania and establish clearly the procedural standards by which zoning ordinances may be applied to individual landowners. The Court must inject order and fairness into the zoning and land development process. When municipalities assume administrative roles, they must be held to the standards of Procedural Due Process. The alternative is chaos. Ungrounded fears, shouted from the floor of zoning hearings, can effectively prevent appropriate and necessary housing construction. The Court should go on record as insisting that zoning decisions be rational, supportable, and based on fact. The Court should establish unequivocally that the long-established principals of Procedural Due Process must apply to the administration of land use and zoning regulations.

The Circuit Courts of Appeals and the states are divided as to (i) whether Procedural Due Process applies to the administration and application of zoning ordinances and (ii) if Procedural Due Process considerations do apply, what level of process is due. These constitutional rights require uniform application between jurisdictions to prevent discriminatory and exclusionary zoning practices and to provide the climate of certainty necessary to allow the investing of resources in land development and much needed affordable housing.

A. Divisions among the States and the Circuits.

The efforts by the Circuit Courts of Appeals to define whether, and to what extent, Procedural Due Process requirements must be incorporated into the administrative role of the zoning authority have resulted in widely disparate results. The Fifth Circuit has concluded that all zoning board activity is legislative and, therefore, the Due Process Clause imposes no restriction on the process utilized by the

zoning board in considering an application under a zoning ordinance, *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir., *en banc*, 1974), *cert.* dismissed 416 U.S. 901, 94 S.Ct. 1625, 40 L.Ed. 2d 1625, *cert.* denied 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed. 2d 64. In *South Gwinnett Venture*, the Fifth Circuit Court of Appeals held that the reliance of the zoning authority on evidence not in the record was not a denial of Procedural Due Process because the action was legislative and not subject to the procedural requirements of the Due Process Clause.

In sharp contrast is the Third Circuit's discussion, in *Rogin v. Bensalem Township*, 616 F.2d 680 (3rd Cir., 1980), of the distinction between the zoning authority's legislative and administrative functions and the procedural requirements that apply when the zoning board acts in its quasi-judicial role. There, the Third Circuit Court of Appeals stated:

"In contrast to legislative action is administrative action -- the scope of which *is* limited by the due process clause. An example of an administrative act would be the denial of a variance, because such an act involves not only general policy considerations but also application of that general policy to an individual landowner." 616 F.2d at 693, fn.60.

Similarly, the First and Second Circuits have found that Procedural Due Process rights do apply in administrative proceedings before the zoning board[12]. These rights include a hearing before an impartial decision-maker and the right to a decision based on facts and known standards.

However, confusion best describes the state of the law in this area. An example is *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir., 1986). There, the Eighth Circuit Court of Appeals stated that Procedural Due Process considerations were relevant, but analyzed the process by the wrong standard. After recognizing that the landowner was entitled to Procedural Due Process, the Eighth Circuit Court should have evaluated the procedural protections afforded. Instead, the Court of Appeals relied on *Euclid v. Ambler Realty*, *supra.*, and analyzed the *decision* of the zoning authority under the Substantive Due Process standard of arbitrariness and reasonableness.

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[12] *Brady v. Township of Colchester*, 863 F.2d 205 (2nd Cir., 1988), citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir., 1982), *cert.* denied, 459 U.S. 989, 103 S.Ct. 345, 74 L. Ed. 2d 385, citing *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976).

Similar confusion and division exists among the states. The Supreme Court of Oregon was among the first of the state courts to adopt the distinction between legislative and quasi-judicial authority in *Fasano v. Board of County Commissioners*, 264 Ore. 574, 507 P.2d 23 (1973). Several other states have followed the reasoning of Fasano, but these states remain a minority.[13]

The states following *Fasano* hold that the zoning authority's legislative function is limited to enactment of the zoning ordinance and comprehensive revisions to the ordinance. Application of the zoning ordinance to a particular property is a quasi-judicial act. Application of the zoning ordinance includes approvals or denials of subdivisions, approvals of planned unit developments and other development projects, special use requests, and variance requests. With the undertaking of this quasi-judicial role, the zoning authority must conform to the requirements of Procedural Due Process. However, states adopting these protections, which are mandated by the Due Process Clause of the Fourteenth Amendment, are the minority.

The Court should establish uniform application of federally protected rights by resolving these conflicts. The Court should establish clear Procedural Due Process standards for the administrative acts of zoning agencies.

B. Application of Procedural Due Process to zoning actions is a logical and necessary safeguard to prevent exclusionary and discriminatory zoning practices.

Exclusionary zoning practices have long been recognized as an improper utilization of the state's zoning power. Exclusionary zoning is generally defined as "the complex of zoning practices which results in closing suburban housing and land markets to low- and moderate-income families."[14] Exclusionary zoning motivated by racial or economic discrimination makes the headlines. But perhaps more pervasive, and equally onerous, is discrimination against new-

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[13] See, Shortlidge, *The "Fasano Doctrine": Land Use Decisions As Quasi-Judicial Acts*, Planning, Zoning, and Eminent Domain (Fall, 1986).

[14] Davidoff and Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 Syracuse L. Rev. 511 (1971).

comers who would like to be part of a community. This type of discrimination is particularly odious in the area of housing. Housing is a fundamental human need. Discrimination against newcomers and outsiders freezes families out of communities. It allows communities to build walls and say "we were here first, no one else may enter." It attacks directly the basic rights to equal opportunity and equal access. Closing communities through exclusionary zoning practice distorts the housing market, limits the opportunity to obtain housing, and places the burden of accommodating new families squarely on those areas already urbanized and overburdened. Exclusionary zoning allows communities to shirk their responsibility to share the increasing burdens of a growing society. The inequality and unfairness injected into communities when arbitrary barriers are erected taints the dream of home ownership.

The Pennsylvania Supreme Court has been in the forefront of the development of the case law condemning exclusionary practices in zoning regulation.[15] It is ironic, therefore, that the decision of the Pennsylvania Supreme Court in the present case opens the door to discriminatory and exclusionary zoning practices. The decision of the Pennsylvania Supreme Court allows the zoning agency to deny approval to development projects without the safeguard of requiring that decisions be based on objective standards. When the zoning agency is permitted to deny land development projects without supportable reasons, there is no effective check on the exclusionary and discriminatory zoning practices that have been universally condemned.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977), the Court was asked to review whether Arlington Heights' refusal to rezone a particular tract of land, to permit a low income housing project, was proper. Following on its decisions in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975), and *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 , 48 L.Ed. 2d 597 (1976), the Court in *Arlington Heights* reaffirmed the landowners' fundamental right to be free from arbitrary and irrational zoning

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[15] See, *National Land Investment Co. v. Kuhn*, 215 A.2d 597, 419 Pa. 504 (1965); *Meyers v. Board of Supervisors of Lower Makefield Township*, 394 A.2d 669, 38 Pa. Cmwlth. 578 (1978).

actions. The Court went on to declare that zoning actions motivated by racial discrimination violate this right. However, the Court was unable to conclude that the denial of Metropolitan Housing's rezoning request by the Village of Arlington Heights was racially motivated.

In essence, the Court concluded that there was insufficient evidence of discrimination. The Court recognized the evidentiary problem faced by parties alleging discrimination in the administration of a zoning ordinance:

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. . . Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . But such cases are rare." 429 U.S. at 266, 97 S.Ct. at ___, 50 L.Ed. 2d at 465.

Arlington Heights was brought to the Court on the theory that the denial of the rezoning violated the Equal Protection Clause. The Court did not review the actions of Arlington Heights from the perspective of Procedural Due Process. This is unfortunate because Procedural Due Process, which requires the zoning agency to disclose the reasons for its decisions, solves the evidentiary problem identified by the Court.

Requiring the zoning agency to make its determination upon known and objective standards and to state reasons for the decision, supported by facts in the record, eliminates the need to inquire into the motivations of the zoning agency. If the stated reasons are not logically consistent with the evidence, then the decision cannot stand. The subjective motivations of the zoning authority, which are virtually never apparent on the record, become irrelevant.

The Court has recognized that discrimination may be accomplished by the enactment of exclusionary zoning ordinances and by a discriminatory application of a facially neutral ordinance. What can be accomplished *de jure* by the express terms of the ordinance may also be accomplished *de facto* by the way the zoning authorities act upon the particular development application. Procedural Due Process requires that a decision of the zoning authority to be supported by facts on the record and makes the prohibition against improperly exclusive zoning practices meaningful. Absent requirements that the zoning agency (i) explain its decision, (ii) identify the

facts upon which it relies, and (iii) limit its reliance to those facts brought to it by competent evidence, the agency may hide its discriminatory and exclusionary intent behind a facade of silence or obfuscation. Without the safeguards of Procedural Due Process, parties aggrieved by the action of the zoning agency are left to attempt to prove the intent of the agency indirectly by historical and circumstantial evidence. As the holding of *Arlington Heights* makes clear, this is a difficult, if not impossible, burden. A direct requirement that the zoning agency explain itself allows the reviewing court to know whether the action of the zoning agency was motivated by legitimate or illegitimate purposes.

C. The effective administration of zoning ordinances is served by Procedural Due Process.

Procedural Due Process rights promote efficiency and accuracy in government actions, including administration of zoning ordinances. Procedural Due Process increases the likelihood that the government agency will make the correct decision.[16] This is particularly appropriate in the present case where the key finding made by the Pennsylvania Supreme Court was factually erroneous.

The Pennsylvania Supreme Court based its decision upon two findings: (i) that the stream into which Petitioner proposed its sewage treatment plant would discharge ran dry and emptied into a pond that had no outlet and (ii) that discharging treated wastewater into such a stream created a risk to public health, safety, and welfare. As is amply demonstrated by Petitioner's Exhibits and Affidavit attached to the Application for Reargument addressed to the Pennsylvania Supreme Court (App., *infra*, 12a-25a), the pond into which the stream runs does have an outlet which flows into the Lehigh River. The Pennsylvania Supreme Court's finding was based on unsworn statements of residents who were not subject to cross-examination. The assumption that discharging treated wastewater into the stream threatens the public interest is not supported by anything in the record. This assumption may have intuitive or emotional appeal, but lacks any basis in fact.

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[16] See, *Gagnon v. Scarpelli*, *supra*, where Justice Powell, writing for the majority of the Court, stated: "These [Procedural Due Process] requirements themselves serve as a substantial protection against ill-considered [government action]...", 411 U.S. at 786, 93 S.Ct. at ___, 36 L.Ed. 2d at 664.

Nevertheless, that assumption motivated both the Board of Supervisors and the Pennsylvania Supreme Court to deny Tentative Approval to Petitioner's Planned Unit Development. This is precisely why so-called "conventional wisdom", which may be quite erroneous, cannot control the application of a zoning ordinance to a particular development application. Instead, facts presented by competent evidence must drive the decision of the zoning agency. Application of the Procedural Due Process requirement that the decision be based only on competent evidence in the record would have avoided these critical factual errors.

Procedural Due Process preserves the fundamental fairness necessary to make the application of zoning ordinances constitutional.[17] Zoning and land use regulation amount to a bargain between the state and the landowner. The state seeks to infringe on the landowner's right to use his land as he wishes by the imposition of land use regulations. The landowner agrees to give up his right to use his land unfettered by zoning restrictions, in exchange for an assurance that he will be able to use his land within certain known guidelines and that he will have the right to argue for a waiver of the restriction if they cause unreasonable harm. Thus virtually all zoning ordinances contain prescribed permitted uses, uses available by special permission (known in Pennsylvania as special exceptions), and provisions for obtaining variances and development approvals.

But this bargain is only meaningful if the state is required to be fair and objective in determining whether the landowner may receive a special exception, a variance, or approval of a planned unit development. The zoning agency, in its legislative capacity, is given broad discretion in enacting ordinances. The agency's duty to explain its actions is minimal because the policy statements are broad and the direct effect on individual properties is largely theoretical and remote. But as the ordinance comes to be applied to particular properties the effect can be immediate and severe. Therefore, the agency has a greater duty to explain its decision rationally and to support the decision with facts. In this way the likelihood of a correct result is increased.

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[17] See *Developments in the Law-Zoning*, 91 Harv.L.Rev.1427 (1978).

When a zoning agency assumes an administrative role, it must also assume the burden of Procedural Due Process to provide for a fair adjudication of the individual rights affected by the governmental action. The action of the Kidder Township Board of Supervisors, in basing its decision on the unsworn comments from the audience at the public hearing, is analogous to the House of Representatives basing a decision to expel a member of Congress solely on unsworn, uncorroborated statements shouted from the gallery. Such a decision would never pass constitutional muster, and neither should the actions of the Board of Supervisors or the Pennsylvania Supreme Court in this case.

Procedural Due Process, with judicial review, serves to insure that decisions of the zoning agency will be rational, not arbitrary. The requirements that a fair hearing be held by an impartial arbiter, that competent evidence be presented, and that the arbiter state its decision in writing, supported by reasons and by facts contained in the record of evidence presented, assure that the rights of the landowner to a fair and accurate decision regarding the use of his land are preserved.

Finally, Procedural Due Process provides a more complete and understandable record upon which the courts of appeal may review the decisions of the zoning agencies. As issues of land development and environmental concern come to the fore, courts will be increasingly asked to review the decisions of local agencies. The requirements of Procedural Due Process not only increase the chances that the local agencies will make the correct decision in the first place, but will provide the reviewing courts with an understandable record upon which to make an informed analysis of the local agency's decision.

D. Effective National Housing Policy requires uniform application of Federally protected rights.

It is axiomatic to say that the federal policies protected by the Fourteenth Amendment should be applied uniformly in all fifty states. Rights guaranteed by the United State Constitution should not be contingent on state law or differing interpretations among the Circuit Courts. Presently, there is no uniform application of these constitutionally protected rights. Landowners in Oregon or, theoretically, the Third Circuit, have a mechanism to enforce their rights to Procedural Due

Process. Landowners in the Fifth Circuit do not. For this reason alone, the Court should direct the uniform application of Procedural Due Process principals to the quasi-judicial actions of zoning authorities.

But land development and housing construction particularly require certainty, clarity and objectivity in the decision-making process. Housing development necessarily demands the investment of large sums of money. Uncertainty increases risk. Increased risk means less housing is built, and the housing that is built costs more. Allowing the municipality to reject housing development projects based on fears rather than facts chills the climate for housing development, particularly planned communities such as in the present case.

Due Process provides the stability and certainty necessary to allow reasonable, appropriate, and necessary housing development. In *Boddie v. Connecticut, supra.*, Justice Harlan recognized this role of Due Process in American society:

"At its core, the right to due process reflects a fundamental value of our American Constitutional system . . . Perhaps no characteristic of an organized society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of it members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a 'legal system', social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive to achievements without the anxiety that would beset them in a disorganized society." 401 U.S. at 374, 91 S.Ct. at ___, 28 L.Ed. 2d at 117.

Planned developments require large initial investments in land acquisition, planning, and engineering costs. If the builder does not know that, upon meeting certain known requirements in the zoning ordinance, he will be able to build the proposed community, the risk will be too great to permit investment. If the municipality is allowed to reject development projects without being able to state reasons supported by evidence, then the climate for building housing is too uncertain to allow reasonable investment in housing projects affordable to middle and working class families. Procedural Due Process enforces the requirement of certainty and fairness that makes decent housing possible in the United States.

CONCLUSION

Zoning and land use regulation necessarily infringe on a fundamental property right -- the right to use one's land freely. The application of zoning ordinances to particular properties or development projects is essentially a judicial and administrative function. These functions must be undertaken only within the framework of the Procedural Due Process protections that have been fashioned to protect individuals from arbitrary and unwarranted government interference.

The Third Circuit has most clearly identified the separate legislative and administrative functions of the zoning agency. The Third Circuit has also identified that Procedural Due Process principals apply when the zoning agency acts in its administrative role.[18] The Petitioner urges the Court to adopt and develop the reasoning of the Third Circuit in *Rogin v. Bensalem Township*. The Court should identify procedural elements that must attend the application of the zoning ordinance, thereby clarifying this important area of the law for the Circuits and the states, which are presently in confusion and conflict.

Procedural Due Process promotes both fairness and accuracy. It mitigates against discrimination and exclusion. Application of Procedural Due Process principals to zoning decisions effectuates the rights the Court has identified in *Warth v. Seldin* and *Village of Arlington Heights, supra*.

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[18] *Rogin v. Bensalem Township, supra.*

The Court should grant a writ of certiorari to review and reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

POCONO GREEN, INC.	:
	:
v.	: NO. 3 E.D.
	: Appeal Docket 1989
	:
	:
	:
BOARD OF SUPERVISORS	:
OF KIDDER TOWNSHIP	:
(CARBON COUNTY),	:
Appellant	:

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the COMMONWEALTH COURT, be, and the same is hereby reversed, and the order of the Court of Common Pleas of Carbon County be and is hereby reinstated.

/s/ Marlene F. Lachman, Esq.
Marlene F. Lachman, Esq.
Prothonotary

Dated: January 16, 1990

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

POCONO GREEN, INC., Appellee,	: No. 3 E.D. Appeal Docket : 1989
v.	: Appeal from the Order of : the Commonwealth Court
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY), Appellant	: dated June 29, 1988, at : Docket No. 1549 C.D. : 1987, reversing the order : of the Court of Common Pleas : of Carbon County at 85-0805, : dated June 19, 1987.
	: ___ Comwlth Ct. ___, : ___ A.2d ____ (1988) : ARGUED: October 26, 1989

OPINION OF THE COURT

MR. JUSTICE FLAHERTY FILED: January 16, 1990

On March 13, 1985, a real estate developer, Pocono Green, Inc., submitted an application for approval of a preliminary plan of a planned residential development (PRD) to the Planning Commission of Kidder Township, Carbon County. The application contains information required for a PRD by section 707 of the Pennsylvania Municipalities Planning Code, 53 P.S. Section 10707, Kidder Township's Zoning Ordinance, and the township's Subdivision and Land Development Ordinance. Among the required materials was Pocono Green's "Report on Sewage and Water Facilities," which explained that because no municipal central sewage treatment facilities were available, the Pocono Green development would have its own facility which would discharge "final treated effluent . . . to an

unnamed tributary of the Lehigh River . . . located at 41 degrees, three minutes N. latitude and 75 degrees, forty-five minutes W. longitude."

The Planning Commission then issued a report and recommendation to the Supervisors, as required by the Subdivision Ordinance, recommending that the application be given tentative approval, conditioned upon the approval of the Pennsylvania Department of Environmental Resources (D.E.R.) for sewage and water systems. On April 29, 1985 the Board of Supervisors conducted a public hearing at which Pocono Green presented its preliminary plan. At this hearing, Pocono Green's engineer testified that the sewage treatment plant was "feasible from an engineering standpoint." Additionally, as required by the Subdivision Ordinance, the developer included in its preliminary plan a letter from D.E.R. stating that Pocono Green's preliminary plans for sewage disposal were acceptable to the agency.[1]

Two local residents testified that the stream into which Pocono Green proposes to dump treated sewage sometimes runs dry and that the stream flows into a pond which does not drain except when there is a flood. Although Pocono Green's engineer was unfamiliar with the stream, he acknowledged that if the stream runs dry and does not flow from the pond,[2] there might be some

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[1] The letter of preliminary approval, dated April 1, 1985, from the Bureau of Water Quality Management, Department of Environmental Resources, stated:

This department has reviewed the preliminary plans for Pocono Green Development , located in Kidder Township and East Side Borough, Carbon County PA. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources.

This letter constitutes concurrence by the Department of Environmental Resources, Bureau of Water Quality Management, of the preliminary proposal only, and should not be construed to represent a permit of any nature. It is still necessary that . . . planning modules, indicating approval of this proposal or a revision to the official plans of the municipalities involved, be submitted to the Department of Environmental Resources for review and approval. More detailed plans and specifications of the water supply, sewage collection and treatment will also be reviewed at a later date as part of other permit applications. Any additional Federal, State and local planning and/or permit requirements must be met.

[2] There was also testimony that the stream runs through the front yard of at least one property owner near the proposed development site.

difficulty getting a final D.E.R. approval. As he put it: "Well, you could see the problems we would have with D.E.R., getting this worked out, no doubt about it." N.T. 77a.

On June 17, 1985, the Supervisors issued their report denying Pocono Green's application based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

* * *

22. Article 4 of the Kidder Township Zoning Ordinance provides there can be no habitation of any portion of the development until the residential use types are attached to a centralized water system and a centralized sewage disposal system. The Municipalities Planning Code indicates that municipalities shall determine the feasibility of proposals for the disposition of sanitary waste and storm water as being in the public interest. We find that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer.

An issue was raised at the public hearing that the stream into which the developer proposes an effluent discharge goes dry. A second issue was raised that said stream runs to a pond from which there is no discharge of water. The testimony of developer's engineer in addressing both of these issues is inconclusive and contradictory. Statements (as found in the record) were made by residents in the area of the stream on record that it does run dry and the pond does not discharge except in flooding.

23. We find after review of all evidence presented that the developer failed to show that the proposed sewage treatment plant which will discharge into a stream which runs dry and leads into a pond that does not discharge to be feasible.[3]

* * *

CONCLUSIONS OF LAW

* * *

The evidence before the Board of Supervisors is sufficiently deficient in showing of the feasibility of the proposed sanitary waste disposal system, being a stream discharge sewage treatment plant. A proposed system which discharges into a stream which often runs dry and leads into a pond with no discharge point is detrimental to the environment, the immediate residents of the area, and all residents of Kidder Township in general.

DECISION

It is decided that the preliminary plan of Pocono Green as submitted is rejected based on the foregoing Findings of Fact and Conclusions of Law with respect to a lack of showing of feasibility of the proposed sanitary waste disposal system ....

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[3] Apparently this means that the developer's sewage treatment plan has not been demonstrated to be feasible.

On July 16, 1985 Pocono Green filed a notice of appeal in the Court of Common Pleas of Carbon County. On June 19, 1987 the court affirmed the Supervisors' decision without taking additional testimony. Pocono Green then appealed to Commonwealth Court, which reversed.

Commonwealth Court reasoned that the board had abused its discretion in determining that the developer had failed to sustain its burden of proving the feasibility of the proposed sanitary waste disposal system. The court indicated that although Pocono Green's engineer was unfamiliar with the flow of sewage into the creek and pond, the approval by D.E.R. and the testimony of a professional engineer that the proposed sewage system was "feasible from an engineering standpoint" constituted substantial evidence of the feasibility of the plan. The board filed a Petition for Allowance of Appeal, and this Court granted allocatur to address the question of whether Commonwealth Court was correct in determining that the board abused its discretion.

Pocono Green argues that the Supervisors' decision was in error in that the township's regulations on PRD applications defer to D.E.R. sewage treatment standards, and compliance with those standards, as evidenced by the D.E.R. preliminary approval, constitutes "feasibility" of a preliminary PRD plan. We disagree.

Section 10707 of the Municipalities Planning Code, 53 P.S. Section 10707, provides that an application for tentative approval of a development plan for a PRD shall be filed before the planning agency or the governing body of the municipality, and the application shall disclose:

* * * *

(v) the feasibility of proposals for water supply and the disposition of sanitary waste and storm water . . . .

53 P.S. Section 10707 (4)(v). Section 10709 further provides that the governing body or planning agency may either grant or deny tentative approval of the development plan as submitted. 53 P.S.

Section 10709 (a).

The "feasibility" of the proposed sanitary waste plan, which the local agency is authorized to decide, is determined, according to Commonwealth Court, by "substantial evidence to support a finding that the solution of a problem is likely to succeed." The burden, of course, is on the developer to prove the feasibility of his plan, and the local agency must determine feasibility by reference to the material presented by the developer.

With these principals in mind, we return to the claim that D.E.R.'s preliminary approval of the sewage treatment plan constitutes "feasibility" of the plan. Accepting Commonwealth Court's definition of "feasibility" as a showing by substantial evidence that the plan is likely to succeed, it is apparent that a preliminary agency approval is irrelevant to the plan's likelihood of success where the developer's expert indicates that he is not familiar with the stream into which the treated sewage would flow and that it will be difficult to persuade D.E.R. to issue a final approval of the sewage treatment proposal. At issue is not whether the sewage treatment plant, considered in a vacuum, is technically adequate, as is indicated by D.E.R.'s preliminary approval. Rather, of course, at issue is the feasibility of the developer's plan *as it will operate at this particular location*.

The approval of PRD applications by local agencies is not intended to be an academic exercise in creating drawing-board images to be considered in isolation from the circumstances in which they will function, but rather a determination of whether a particular drawing-board image will work as it was intended in a particular location in the real world. That is why the approval is contingent upon the feasibility of the plan, not merely upon the acquisition of a preliminary approval from D.E.R.

Further, the statute clearly places the burden of establishing this feasibility on the developer, who must submit substantial evidence that the plant will function properly where it is to be located. When the developer cannot answer questions about how the facility will operate at this location, the township may properly determine, indeed must determine, that the developer has not proved the feasibility of its plan by substantial evidence. For these reasons, the claim that D.E.R.'s preliminary approval should constitute "feasibility" under the statute is obviously without merit."[4]

Next, the developer contends that the Supervisor's reasons for denying approval are legally deficient. In particular, the developer argues that the township may not deny approval of a PRD application on grounds not contained in its ordinances. The grounds complained of are the township's findings that the proposal requires the discharge of treated sewage into a stream that runs dry leading in to a pond that does not discharge. These grounds, according to the developer, are not present in the township's land use ordinance. We understand this argument to mean that because the township has no ordinance prohibiting the discharge of sewage into streams that run dry leading to ponds with no outlet, such

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[4] Pocono Green cites our recent decision in *Coretsky v. Board of Commissioners of Butler Township*, 520 Pa. 513, 555 A.2d 72 (1989), in support of the argument that the township cannot deny approval of a PRD application on the basis of a standard not in its regulations. In *Coretsky* the township, pursuant to section 10508 of the Municipalities Planning Code, was required to specify the section of the statute or ordinance upon which its denial of approval was based:

(2) When the application is not approved... the decision shall specify the defects found in the application and describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.

53 P.S. Section 10508 (2). The township did not specify the statutory provision upon which its denial of approval was based, and this Court held that the denial was, therefore, improper.

Coretsky has no application to the present case. In this case, the township is authorized by section 10707 of the Municipalities Planning Code to determine the feasibility of the developer's plan for sewage treatment. Such a determination, of course, must be made on the basis of information submitted by the developer. When that information does not support the feasibility of the sewage disposal plan, the township is authorized to disapprove of the application.

grounds may not be used to support a denial. Thus, according to the developer, because the township's ordinance contains no sewage requirements except that the treatment plan be approved by D.E.R., and because D.E.R. has issued a preliminary approval, the denial was in error. This argument is actually only a variation on the first argument, and also is completely meritless. The developer overlooks that the burden of presenting substantial evidence of feasibility is with him, and when he is unable to answer objections to his plan, and, in fact, indicates that he may have difficulty with the approval, the mere possibility that D.E.R. will finally approve his plan falls short of meeting that burden.[5]

Finally, the developer argues that the denial was in error because the township's findings were not supported by substantial evidence. According to the developer, it will have to meet D.E.R.'s most stringent criteria for effluent quality because the stream into which it proposes to discharge treated sewage is classified as a "high quality cold water fisher[y]." Since the township failed to make any findings as to the capabilities of the developer's proposed method of treatment, the engineering characteristics of the treatment plant, or the specific effect of the treatment plant on the stream, the developer contends that the township's determination was unsupported by substantial evidence. This argument, too, is without merit. Once again, the burden is on the developer to establish the feasibility of the sewage treatment plan, not on the township to establish its nonfeasibility. When the developer fails to meet that burden by substantial evidence, the township has no alternative but to determine that the plan is not feasible.

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[5] The developer also makes two additional related claims. First, it asserts that the Supervisors failed to provide specific objections to the plan. We disagree. The specific objections to the plan are that the developer did not meet his burden of establishing "feasibility" by presenting substantial evidence that the plan was likely to succeed.

Next, the developer claims that the requirement of D.E.R. approval is adequate in itself to protect the public interest, and therefore, that the board improperly withheld approval. Whether D.E.R.'s approval is sufficient to protect the public interest is an argument more appropriately addressed to the legislature than to this Court. The General Assembly specifically chose to empower local governing bodies to approve or disapprove the feasibility of certain components of planned residential developments, and the developer may not usurp this statutory scheme by substituting its opinion for that of the General Assembly as to how the public interest should be protected.

It is true that the township, pursuant to section 10709 of the Municipalities Planning Code, is required to set forth reasons for the denial "with particularity in what respect the development plan would or would not be in the public interest, including, but not limited to, findings of fact and conclusions on the following:

* * * *

(4) the physical design of the development plan and the manner in which said design does or does not make adequate provision for public services, . . . and further the amenities of light and air, recreation and visual enjoyment;

(5) the relationship, beneficial or adverse, of the proposed planned residential development to the neighborhood in which it is proposed to be established; . . . .

53 P.S. Section 10709 (b) (4), (5). It should go without saying, however, that when a developer has proposed a sewage treatment plan unsupported by substantial evidence demonstrating the feasibility of dumping treated sewage into a stream that runs dry, ending in a pond with no outlet, the public interest is at risk, the physical design of the proposal is deficient, the manner of the deficiency of public service is obvious, and the relationship to the neighborhood is adverse. The township was certainly not, therefore, derelict in its findings or its conclusions of law supporting the denial.

The order of Commonwealth Court is reversed. The order of the Court of Common Pleas of Carbon County is reinstated.

Mr. Justice McDermott did not participate in the consideration or decision of this case.

Mr. Justice Larsen files a dissenting opinion, which is joined by Mr. Justice Zappala.

DISSENTING OPINION

JUSTICE ROLF LARSEN FILED: January 16, 1990

I dissent. Although there is some emotional appeal to Mr. Justice Flaherty's majority opinion in this case, there is absolutely no legal basis for the Court's reversal of Commonwealth Court.

The Pennsylvania Municipalities Planning Code, Section 11005-A provides in relevant part:

> ...If the record below includes findings of fact made by the governing body, board or agency whose dicision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board, or agency shall not be disturbed by the court *if supported by substantial evidence....*

53 P.S. Section 11005-A. There is no evidence of record that the unnamed tributary of the Lehigh River into which appellee, Pocono Green, Inc., planned to discharge treated effluent runs dry occasionally or that it flows into the pond with no outlet. The record herein reveals that appellee, during the public hearing on its application for preliminary approval of a planned residential development, produced 1) the sworn testimony of a registered professional engineer stating that appellee's plans for a central sewage treatment and disposal were feasible, and 2) a letter from the Department of Environmental Resources (DER) giving preliminary approval to those plans. The residents who spoke at the public hearing regarding the condition of the Lehigh River tributary into which appellee proposed discharging treated effluent were not sworn in as witnesses and were not subject to cross-examination during the proceedings. Thus, it is clear that the determination of the Board of Supervisors, i.e., that the sewage treatment proposal was not feasible because the tributary ran dry at times and ended in a pond with no outlet, was not supported by substantial evidence.[1]

Additionally, a stream that flows intermittently can indeed serve as a recipient of treated waste, as can a pond with a "detention time of 14 days or more." See 25 Pa.Code Section 95.6(a) Discharges to lakes, ponds, and impoundments; *Abraham v. Commonwealth of Pennsylvania, Department of Environmental Resources,* 1980 EHB 146 (DER can require "very high degree of treatment" to sewage where receiving stream does not flow year round).

As appellee met its burden of proving that the proposed sewage treatment and disposal system was feasible, appellant, the Board of Supervisors of Kidder Township, abused its discretion in denying preliminary approval to appellee's application. The DER has

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[1] A court may take judicial notice of geographical facts; however, the extent of flow or navigability of a given watercourse must "be established by proof." See, *Brush v. Lehigh Valley Coal Co.*, 290 Pa. 322, 138 A. 860 (1927).

the expertise to determine whether or not a permit can be issued to appellee based upon the conditions existing at the site. And, indeed, a permit will not issue and the planned residential development will not be constructed if appellee's plans are in any way inadequate or constitute a threat to the environment. It is not for the Board of Supervisors or for this Court to determine, on the basis of unsworn statements of lay persons, that a particular sewage treatment and disposal system is not feasible.

Accordingly, I would affirm the decision of Commonwealth Court.

Mr. Justice Zappala joins in this dissenting opinion.

APPENDIX B

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

----------x

POCONO GREEN, INC.,	: No. 3 E.D. Appeal Docket 1989
Appellee,	:
-against-	: Appeal from the Order of the Commonwealth Court dated June 29, 1988, at Docket No. 1549 C.D. 1987, reversing the
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY),	: order of the Court of Common Pleas of Carbon County at No. 85-0805, dated June 19, 1987
Appellant	:
	: ____Comwlth Ct.____, ____ A.2d _____(1988)
	: ARGUED: October 26, 1989
	: DECIDED: January 16, 1990

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APPLICATION FOR REARGUMENT OF APPELLEE POCONO GREEN, INC.

Application of Appellee for Reargument from Judgment of Supreme Court of Pennsylvania of January 16, 1990

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APPLICATION OF APPELLEE FOR REARGUMENT

I. ORDER IN QUESTION

Pursuant to Rules 2542-2544 of the rules of this Court, Appellee Pocono Green, Inc. respectfully moves for reargument of this Court's Order filed January 16, 1990, in which the Court, by a vote of 3-2 (one Justice withdrawn and one vacancy), reversed the Order of the Commonwealth Court and reinstated the Order of the Court of Common Pleas of Carbon County in a case which will have a great impact on the cost of middle income housing throughout the Commonwealth.

II. REASONS FOR ALLOWANCE OF REARGUMENT:

A. POINTS OF LAW OVERLOOKED OR MISAPPREHENDED:

1. THE COURT OVERLOOKED OR MISAPPREHENDED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

a. The decisions by this Court's majority that (i) "the stream runs dry, ending in a pond with no outlet," (ii) "the public interest is at risk," (iii) "the physical design of the proposal is deficient," and (iv) "the relationship to the neighborhood is adverse" (Opinion, p.11) are not based upon competent and admissible evidence on the record. The first decision referenced above [(i)] was not based on competent evidence (See II.A. (1) (b), *infra*.). Decisions (ii) through (iv) above were based on absolutely no evidence. As such, those decisions are irrational, arbitrary and capricious and, therefore, a denial of Appellee's right to due process.

Approvals from political subdivisions of the States, which are required before a party's land can be improved or developed constitute "property" under the Fourteenth Amendment and are subject to due process protections. *Bello v. Walker*, 840 F. 2d 1124 (3d Cir., 1988); *Herrington v. Sonoma*

County, 834 F. 2d 1488 (9th Cir., 1987). Deprivation of property will not be allowed where there is no evidence to support it. *Thompson v. Louisville*, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960).

b. The Township's failure to place the objectors under oath, followed by the Township's consideration, as evidence, of their unsworn statements, not subject to cross-examination, violates Appellee's right to due process. The lack of due process is no mere academic exercise in this case. It has resulted in this Court resting its decision, in large part, upon erroneous "facts". The stream in question does not "end in a pond with no outlet." The statements of the objectors in that regard which were relied upon by the Township and this Court were false or misleading. (See Sections II.B.2 (c) and (d) and Exhibits "A" and "B" attached hereto).

c. The Pennsylvania Department of Environmental Resources ("DER") standards absolutely control all facets of design and operation of sewage treatment systems. *Council of Middletown Twp. v. Benham*, 514 Pa. 176, 523 A.2d 311 (1987). The Township expressly adopted the standards of DER as the *only* standard to be met in all matters involving sewage (See Appellee's Appendix, pp. 15, 120, 109, 110, 36, and 85), and the record shows that the sewage treatment system proposed by Appellee is feasible according to DER. (Appellee's Appendix, p. 155). The Township's denial of tentative approval based upon Appellee's purported failure to satisfy the more indefinite standard of "feasibility" referenced in Section 709(4)(v) of the Municipalities Planning Code ("MPC") is arbitrary, capricious, and irrational, and a denial of due process.

2. THIS COURT OVERLOOKED OR MISAPPREHENDED SECTION 1005-A OF THE MUNICIPALITIES PLANNING CODE, 53 P.S. 11005-A, WHEN IT FAILED TO OVERTURN THE FINDING OF THE TOWNSHIP THAT THE STREAM RUNS DRY AND ENDS IN A POND WITH NO OUTLET, IN THE ABSENCE OF SUBSTANTIAL, OR ANY, EVIDENCE.

This Court has, on numerous occasions, stated that where the Court of Common Pleas takes no additional evidence,

the appellate courts are limited to a determination of whether the board committed an abuse of discretion or error of law. *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504, p. 523, 215 A.2d. 597, p. 607 (1965); *Appeal of M. A. Kravitz Co.*, 501 Pa. 200, 460 A.2d. 1075 (1983). "The court may not disturb the findings of the board if the record indicates the findings are supported by substantial evidence. 53 P.S. Section 11010." *Kravitz*, 460 A.2d. p. 1081.

There is absolutely no competent evidence of record to support the finding that the stream in question runs dry and ends in a pond with no outlet. The only mention of these alleged characteristics of the stream is unsworn testimony which was not subject to cross-examination. The Appellee never had the opportunity, obligation, or duty to refute these unsworn statements. It is a violation of the MPC, 53 P.S. 11005-A (formerly 53 P.S. 11010), for the board to base a finding upon those unsworn statements.

3. THIS COURT OVERLOOKED OR MISAPPREHENDED THE CHOICES AVAILABLE TO THE TOWNSHIP UNDER SECTION 709 OF THE MUNICIPALITIES PLANNING CODE.

The Court states that "Section 10709 [sic] further provides that the governing body or planning agency may either *grant* or *deny* tentative approval of the development plan as submitted. 53 P.S. Section 10709 (a)." (Opinion, p. 6, emphasis added) Section 709 of the MPC actually provides for a third alternative, which may be the most practical, and most just, manner of resolving the dispute between the parties in this case. That third alternative is for the Township to "grant tentative approval subject to specified conditions not included in the development plan as submitted." 53 P.S. Section 10709 (a)(2).

B. POINTS OF FACT OVERLOOKED OR MISAPPREHENDED

1. THE COURT MISAPPREHENDED DER'S PRELIMINARY APPROVAL AS BEING THE RESULT OF A TECHNICAL, ACADEMIC EXERCISE THAT DID NOT EVALUATE THE PROPOSED SEWAGE TREATMENT PLANT AS IT WILL OPERATE AT THE PARTICULAR LOCATION PROPOSED BY THE APPELLEE.

This Court misapprehended the significance of DER's preliminary approval when the court concluded that it was not substantial evidence of the feasibility of Appellee's sewage treatment plan. The court evidenced this misunderstanding when it stated:

"At issue is not whether the sewage treatment plant, considered in a vacuum, is technically adequate, as is indicated by D.E.R.'s preliminary approval." (Opinion of the Court, p.7)

The Court overlooked the fact that DER reviewed Appellee's development plans before issuing its preliminary approval. (Appellee's Appendix, p. 155) Those plans specify the number of dwellings which the treatment plant would service, the water supply and distribution system, the sewage collection and disposal system, the exact latitude and longitude of the discharge into the stream, and the quality and anticipated volume of the treated effluent. (Appellee's Appendix, p.p. 137-140)

The Court overlooked the public record showing that DER was familiar with the stream in question. Under the Clean Streams Law, DER is authorized to survey and catalog all of the waters of the Commonwealth and set water quality standards for each body of water. 35 P.S. Section 691.304. DER did that survey, prepared water quality standards for all of the waters of the Commonwealth, including the present stream, and codified that survey in the Pennsylvania Code, 25 Pa. Code Chapter 93. The classification of the subject stream is found at 25 Pa. Code Chapter 93.9, List D, p. 93-28. When DER granted preliminary approval of Appellee's plans, it did so knowing full well the stream and its characteristics.

2. THE COURT MISAPPREHENDED THE EVIDENCE OF RECORD REGARDING THE STREAM AND POND.

a. The Court misapprehended the comments of Appellee's engineer. The comment of Appellee's engineer, which the Court emphasized in upholding the Supervisors' finding of lack of feasibility, is in the *subjunctive* (Opinion, p. 3). That comment has absolutely no significance in the absence of a finding, by substantial evidence, that the stream runs dry and does not flow from the pond. At a later point in the hearing, the engineer put his prior comment in context when he stated:

"...we are not going to have a permit to build anything there unless we can demonstrate about the stream, and, *if* it is as bad as you say it is, then the requirements for treatment at that location are going to be more stringent." (Appellant's Reproduced Record, pp. 86a, 87a, emphasis added.)

b. The Court overlooked the statement of Appellee's engineer in his Report on Sewage and Water Facilities that the "[f]inal treated effluent [from the sewage treatment plant] will be discharged to an un-named tributary of the Lehigh River which flows into the river 0.8 miles downstream at a point opposite Tannery." (Appellee's Appendix, p. 140) This statement was uncontroverted by competent evidence and shows the engineer's familiarity with the stream. The stream, obviously, cannot both flow into the Lehigh River and "end in a pond with no outlet".

c. The fact that the stream does *not* end in a pond with no outlet is evidenced by the Affidavit of Christopher L. Borton, a professional engineer. The Affidavit is attached hereto, marked Exhibit "A" and incorporated herein.

d. The fact that the stream does *not* end in a pond with no outlet is further evidenced by the United States Department of the Interior Geological Survey map for the White Haven Quadrangle ("USGS map"). The USGS map shows the stream which is the focus of this case as a solid blue line from the proposed discharge point at latitude 47 degrees 03'00", longitude 75 degrees 45'00" to the pond, *and then from the pond to the Lehigh River*.

The official USGS map for the White Haven quadrangle is attached to the original of this Application for Reargument as Exhibit "B" and incorporated herein. This Court can take judicial notice of the USGS map.

3. THE COURT MISAPPREHENDED THE PERMITTING PROCESS FOR APPELLEE'S TREATMENT PLANT.

The Court misapprehended the process by which Appellee must ultimately obtain a National Pollution Discharge Elimination System ("NPDES") permit to build and operate its sewage treatment plant. DER's regulations for obtaining an NPDES permit require extensive review by DER, public notice of the permit application, and public hearings on the application. (25 Pa. Code Chapter 92) The final decisions of DER are subject to judicial review.

C. SIGNIFICANT PUBLIC POLICY CONCERNS:

This is a Planned Residential Development case which is: (a) a preferred method of development sanctioned by both case law and statute, and (b) the method under which a significant amount of middle income townhouses are built in this Commonwealth, as is this one. [1] The holding in this case will cause a significant increase in the cost of such development and throw a

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[1] Planned Unit Development (or Planned Unit Residential Development) was sanctioned by this Court in *Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968) and that holding was carried over and codified as Article VII of the Pennsylvania Municipalities Planning Code. Later this kind of development was given a further imprimatur of approval by this Court in *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970).

[2] One of the most significant parts of the decision-making process to go ahead with large scale development, to undertake to spend the huge sums of "front end" money and to obtain the necessary financing, is the ability to engineer out all of the uncertainties in order to project costs and returns on investment. The more uncertainty, the more risk; the more risk, the less gets done. In this case it is not one of the superfluous products of American industry, but principally housing for the middle and working classes of Pennsylvania. The issue here involved the affordability of that housing which is again stirring controversy here and elsewhere. See Exhibit "C" attached hereto.

strong element of uncertainty into the planning process.[2] Both effects will drive up costs for a class or group of citizens already squeezed by declining industrial jobs, higher interest rates, and the export of work to lower wage countries.

The Planned Unit Development concept subsumed certain things which turned out to be true. The first was that large scale development is inherently different from small scale development. Because of that, there could be certain economies which could be shared between the producers, consumers and municipalities. The municipalities would get greater aggregates of open land, fewer roads, sidewalks, pipelines, etc. to maintain. The producers would get less road to build, higher densities and a better product to sell. The consumer would get better housing, more innovatively designed, in better surroundings at a lower price.[3] Almost all of the Planned Residential Developments in Pennsylvania, as elsewhere, are townhouse or substantially townhouse developments.

In this case the Court has created, by a one vote margin, a terrible dilemma for the producer which must inevitably adversely impact the consumer. By statute, the approval process is in two stages; the first stage is a preliminary one (which is called "Tentative Approval") and the second stage is called "Final Approval." In the Tentative Approval stage, all that is envisioned is that the plan, as presented, meets the legal criteria of the ordinance and that it is "feasible", that is capable of being done. The purpose of setting the "feasible" standard is to keep down the huge costs of "up front" engineering studies, surveys, borings, etc. The difference between the feasibility studies and final engineering can be hundreds of thousands of dollars. The protection to the local authorities is that Final Approval, upon which actual building permits are granted, cannot be obtained until the final engineering is done and pre-proven to be appropriate and effective. Final Approval is not given until all plans, specifications and details are fully

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[3] These are in contrast to "cookie cutter" subdivisions which are not only environmentally unsound, but very expensive to build and, hence, to sell. Even one acre subdivisions virtually require that almost every inch of the land be bulldozed. When constructed, Planned Development obviates much of this.

and completely engineered, reviewed and approved. Tentative Approval merely gives the producer an assurance that if the plan complies with all of the safeguards, Final Approval will be forthcoming. The key is that it is the Tentative Approval, and that assurance, which permits him to get financing, in most instances. That is not something at which to be sneezed! It is the vital link in the housing industry.

In this case, and traditionally, the determination of whether or not a sewer system will or will not work, or whether it will be approve or not approved, is determined by DER which acts under the guidelines of the Federal Environmental Protection Agency (EPA) and the Clean Streams Law.[4] Ultimately, the licensure of a sewer plant is DER's responsibility as is its continued operation, which is monitored by frequent inspections.[5] Here DER in effect gave its "Tentative Approval" and against that all that appears of record is that two lay persons stand up out of the audience, unsworn, neither parties nor witnesses, and voice unverified opinions as to an irrelevant fact which is used for the basis of the only Finding of Fact leading to the only Conclusion of Law that is fatal to the application.

The record shows that a registered professional engineer says the sewage system will work (Appellant's Reproduced Record, p. 53a) and DER says it will work. If this kind of refusal is to be affirmed in every application for Planned Residential Development, then any unfounded fear (to satisfy the "no development" types present in every community) may be relied upon by a municipality to deny otherwise perfectly legitimate housing opportunities. The only way the producer can avoid this is either not to go into Planned Unit Development, or to overload the "front end" and thus increase the cost to the consumer. Neither is good for the people of this Commonwealth and both are contrary to the

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[4] Act of June 22, 1937, P.L. 1987, 35 P.S. Sections 691.1 to 691.1001.

[5] See *Council of Middletown Twp. v. Benham*, 514 Pa. 176, 523 A.2d 311 (1987).

announced public policy of both the Courts and the legislature.

D. THESE ISSUES SHOULD BE DECIDED BY AS FULL A COURT AS POSSIBLE:

As noted, this was a 3-2 case. The decision here involves the affordability of housing to a major segment of our population and one of the dominant forms of that housing. It should have the attention of as full a court as possible. This case deserves as thorough an exegesis of the legal, social and economic issues as is possible under the circumstances. While the majority's decision turns on seemingly narrow grounds, those grounds have profound effects on the cost of housing, how much is built, how it is built and into which market; upper income, middle income, or working class income those housing dollars will flow. The ability of the present system to meet these needs is at stake. This decision is an important one and it deserves all the respect and attention it can be given.

Respectfully submitted,

/s/ Lenard L. Wolffe

Lenard L. Wolffe
45 Darby Road
Paoli, Pennsylvania 19301
(215) 647-6200
Attorney for Appellee,
Pocono Green, Inc.

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Luzerne :

I, the undersigned Christopher L. Borton, being duly sworn according to law, doth depose and say that:

1. I am a principal in the firm of Borton-Lawson Engineering, a registered professional engineer, licensed by the Commonwealth of Pennsylvania by License No. PE 031473-E, and have been so licensed since 1982;

2. I am familiar with the requirements of the Pennsylvania Department of Environmental Resources ("DER") with regard to stream discharges from sewage treatment plants;

3. I have personally viewed the stream located at latitude 41 degrees 03'00, longitude 75 degrees 45'00", in Kidder Township, Carbon County, Pennsylvania;

4. On January 28, 1990, I personally observed said stream from the aforesaid latitude and longitude to where it flows into the Lehigh River;

5. Said stream does not end in a pond with no outlet;

6. Said stream flows from latitude 47 degrees 03'00", longitude 75 degrees 45'00" to an impoundment (commonly known as a "pond") created by a railroad embankment, which then discharges through a concrete arch culvert to the Lehigh River. On January 28, 1990, I observed an outlet flow of water from that impoundment into the Lehigh River approximately equivalent to the flow of water entering the impoundment;

7. Assuming, for hypothetical purposes, that said stream were to become dry at times, it is my professional opinion that, using available technology and equipment, it is feasible to construct and operate a sewage treatment plant that discharges treated effluent into said stream at said latitude and longitude which (i) will meet the applicable standards of the DER and (ii) will not be detrimental to the environment, the residents of the area where the stream is located, or all residents of Kidder Township, nor will such effluent place the public interest at risk or have an adverse effect on

the neighborhood surrounding the proposed planned unit development known as Pocono Green or said stream;

8. Said stream is shown on the map of the United States Department of the Interior Geological Survey ("USGS map") for the White Haven Quadrangle as a solid blue line from the aforesaid latitude and longitude to where it enters the east end of a pond or impoundment. At the west end of said pond the USGS map shows, by a solid blue line, a stream from said pond to the Lehigh River; and

9. Attached hereto as Appendix "A" are photographs which I took on January 28, 1990, showing the point of discharge from the aforesaid impoundment, or pond, into the concrete arch culvert and then into the Lehigh River.

/s/ Christopher L. Borton
Christopher L. Borton

Sworn to and subscribed
before me this 29th day
of January, 1990

/s/

_____
Notary Public

PHOTOGRAPHS

DOWNSTREAM END OF CULVERT LOOKING UPSTREAM (East) TOWARD POND

CONFLUENCE OF STREAM WITH LEHIGH RIVER, LOOKING WEST

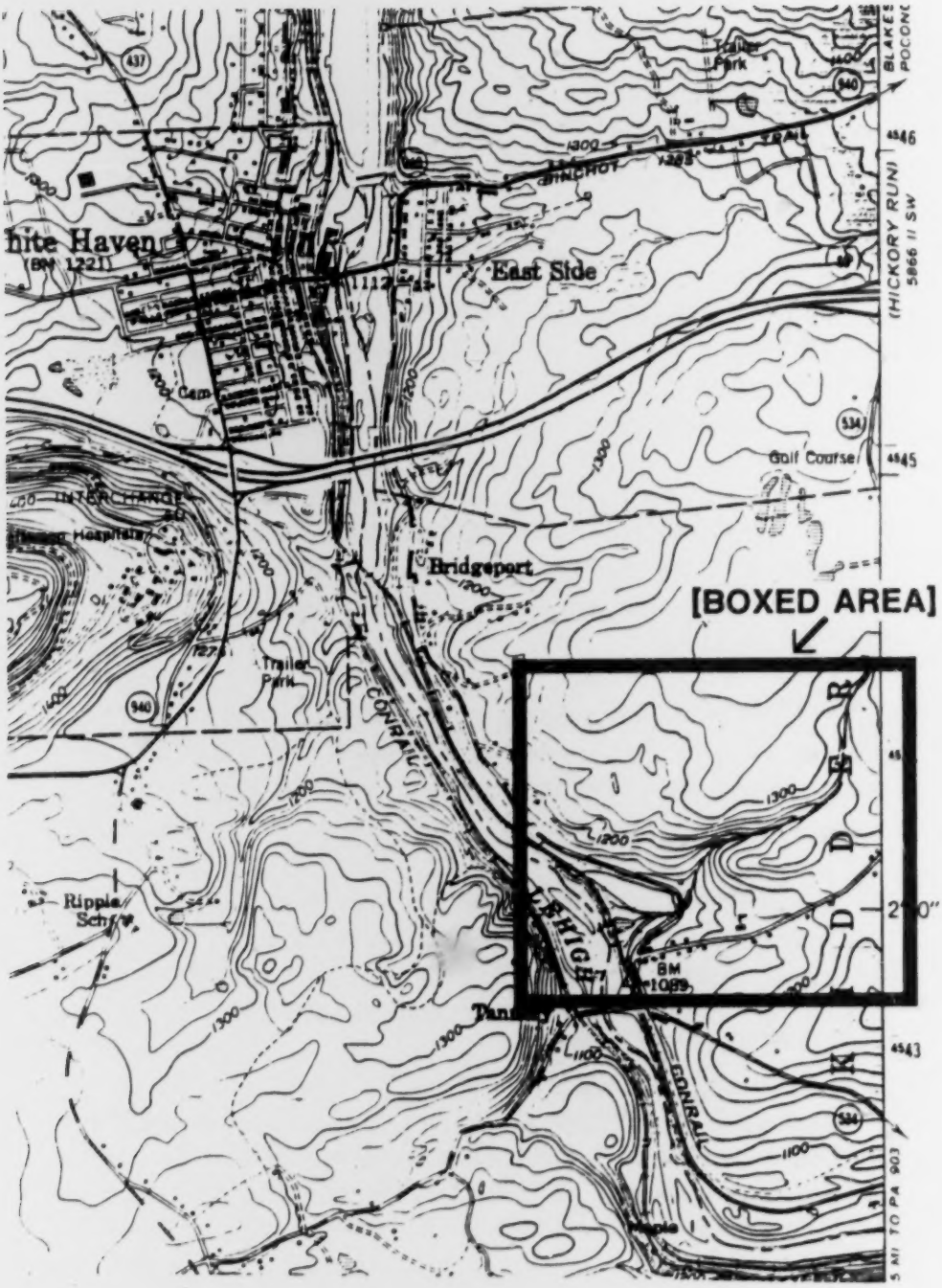

Exhibit B

(Area circled in yellow and stream highlighted in blue on original of Exhibit B are shown here in black-and-white only, within boxed area.)

(Exhibit C was not reproducible.)

APPENDIX C

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

August 29, 1990

Lenard L. Wolffe, Esquire
PROTNOFF, HOUPT & WOLFFE, LTD.
45 Darby Road
Paoli, Pa. 19301

RE: *Pocono Green, Inc. v. Board of Supervisors of Kidder Township, Appellant*
No. 3 E.D. Appeal Docket 1989

Dear Mr. Wolffe:

This is to advise you that the following Order has been endorsed on your Application for Reargument of Appellee Pocono Green, Inc., filed in the above captioned matter:

"August 22, 1990.

Denied.

Per Curiam".

Mr. Justice Larsen would grant reargument.

Very truly yours,

/s/ Marlene F. Lachman, Esq.
Marlene F. Lachman, Esquire
Deputy Prothonotary

/ma
cc: William E. McDonald, Esquire
Roger Nanovic, Esquire
Loudon L. Campbell, Esquire

APPENDIX D

POCONO GREEN, INC.,	:	IN THE COMMONWEALTH
	:	COURT OF PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
BOARD OF SUPERVISORS	:	
OF KIDDER TOWNSHIP,	:	
	:	
Appellee	:	No. 1549 C.D. 1987

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE JACOB KALISH, Senior Judge

ARGUED: February 25, 1988

OPINION

BY SENIOR JUDGE KALISH FILED: June 29, 1988

Pocono Green, Inc. (developer) appeals from an order of the Court of Common Pleas of Carbon County which affirmed the Board of Supervisors of Kidder Township's (Board) denial of preliminary approval of its planned unit development. We reverse and remand.

The developer filed its application for preliminary approval of a planned unit development which contained information concerning the "feasibility" of proposals for the disposition of sanitary waste, and storm water. According to the developer's application for tentative approval, a privately-owned sewage plant would be installed at the development to handle all wastewater generated there.

The Department of Environmental Resources (DER), which is charged with the duty to approve or disapprove, gave its preliminary approval for the feasibility of the program. The developer relied on the testimony of John A. Burke, a professional engineer

who testified that the proposed sewage system was "feasible from an engineering standpoint." Notes of testimony at 47. However, his testimony indicated that he was not familiar with the flow of the sewage into the creek and pond. The Board of Supervisors of Kidder Township found that the stream into which the developer proposes an affluence discharge goes dry and that the stream runs into a pond from which there is no discharge of the water.

The developer contends that the Board abused its discretion in determining that the developer had not met its burden of showing feasibility. The court of common pleas, without taking additional testimony, sustained the Board.

Our scope of review is to determine whether the Board abused its discretion or committed an error of law. *Doran Investments v. Muhlenberg Township*, 10 Pa. Commonwealth Ct. 143, 309 A.2d 450 (1973). An abuse of discretion occurs where the result is manifestly unreasonable as upon a showing of fraud, bad faith, capricious action or is in capricious disregard of competent evidence. *Lily Penn Food Stores, Inc. v. Pennsylvania Milk Marketing Board*, 80 Pa. 266, 472 A.2d 715 (1984). Once an applicant shows compliance with the necessary criteria, it is an abuse of discretion to deny preliminary approval.

In support of its position, the developer argues that the Board had no authority to deny tentative approval to the development because the state preempted this field. In *Council Middletown Township v. Benham*, 514 Pa. 176, 523 A.2d 311 (1987), where this issue was raised, the court held that in analyzing the Sewage Act, the legislature did not intend to preempt this field.

Here, the proposed plan shows that a sewage plant will be installed at the development to handle all generated waste, thus conforming with requirements of section 701 of the Pennsylvania Municipalities Planning Code,[1] and the local ordinance. In addition, a letter from DER states that the proposal submitted, utilizing private water supply and distribution and for sewage treatment, is acceptable to DER.

The term feasibility means that there is substantial evidence to support a finding that the solution of a problem is likely to succeed.

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[1] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. Section 10701.

The evidence that the developer presented on the question of sewage disposal consisted of the testimony of Mr. Burke and the approval of the system by DER, as contrasted to the testimony of two laypersons.

The Board abused its discretion in concluding that the developer had failed to sustain its burden of proving that the proposed sanitary waste disposal system was feasible. There was substantial evidence to support a conclusion of feasibility.

Accordingly, this matter is reversed and remanded to the common pleas court with instructions to enter an order directing the Board of Supervisors of Kidder Township to grant preliminary approval of the developer's planned unit development.

/s/ Jacob Kalish, Senior Judge
JACOB KALISH, Senior Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

POCONO GREEN, INC., Appellant	:	
vs.	:	No. 85-0805
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP, Appellee	:	

Roger N. Nanovic, Esquire and Lenard L. Wolffe, Esquire — Counsel for Appellant

William E. McDonald, Esquire — Counsel for Appellee

OPINION

LAVELLE, P. J. - June 19, 1987

This is an appeal from a refusal to tentatively approve a subdivision plan.

On March 13, 1985, in accordance with Article VII of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. Section 10701 *et seq.* (hereafter "Act"), Pocono Green, Inc. (hereafter "Developer") submitted an application to the Kidder Township Board of Supervisors for tentative approval of a proposed Planned Unit Development called Pocono Green (hereafter "Development"). After holding a public hearing on April 29, 1985, the Board concluded that there was "a lack of showing of feasibility of the proposed sanitary waste disposal

system" and denied tentative approval of the Development. Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code and the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan (hereafter "Report of the Supervisors"), p. 14. On appeal, the Developer challenges this conclusion as erroneous.

The matter was submitted to us on the record created before the Board. After reviewing the record, and after considering the briefs and oral arguments of counsel, we find that the Board committed no reversible error. We shall therefore deny the appeal and affirm the decision of the Board.

FACTS OF THE CASE

Pocono Green, Inc. (hereafter "Developer") is the equitable owner of an 88.769 acre tract of land (hereafter "tract") in Carbon County, Pennsylvania. The tract is an irregularly shaped parcel which straddles the border of two political subdivisions: 51.076 acres of the tract are in Kidder Township and 37.753 acres of the tract are in East Side Borough. The proposed Development would consist of two hundred (200) units in Kidder Township and two hundred and sixty-five (265) units in East Side Borough.

According to the Developer's Application for tentative approval, a privately owned "stream discharge" sewage treatment plant will be installed at the Development to handle all waste water generated therein. After the effluent is treated at the plant, it will be discharged into Slaughterhouse Creek (hereafter "creek"). It is the ability of this creek to handle the flow of effluent emanating from the proposed sewage treatment plant which is the focal point of this dispute.

DISCUSSION

On appeal from a decision by a governing body denying tentative approval of a Planned Unit Development, our scope of review is the same as in zoning cases. *Brauns v. Swarthmore Borough*, 4 Pa.Cmwlth. 627, 288 A.2d 830 (1972); *DeFeo v. Brookhaven Borough*, 3 Pa.Cmwlth. 377, 283 A.2d 505 (1971). Therefore, since we neither heard testimony nor received addi-

tional evidence on this matter, our standard of review is limited to determining whether the Board committed an error of law or an abuse of discretion. *Nascone v. Ross Township Zoning Hearing Board*, 81 Pa.Cmwlth. 482, 473 A.2d 1141 (1984); *Doran Investments v. Muhlenberg Township et al.*, 10 Pa.Cmwlth. 143, 309 A.2d 450 (1973).

In the present case, the Developer claims that the Board manifestly abused its discretion and committed positive errors of law in concluding that the Developer had failed to sustain its burden of proving that the proposed sanitary waste disposal system was feasible The Developer also contends that the Board lacked the authority to undertake an independent determination of the feasibility of the sewage system because: 1) this subject matter has been preempted by state law; and 2) the township has no ordinance which specifies the criteria by which the instant application could be judged. We will address these issues seriatum.

1. Feasibility of proposed sewage system

The Board made the following Findings of Fact concerning the feasibility of the proposed sewage system:

22. ... We find that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer.
An issue was raised at the public hearing that the stream which the developer proposes an effluent discharge goes dry. A second issue was raised that said stream runs to a pond from which there is no discharge of water. The testimony of developer's engineer in addressing both of these issues is inconclusive and contradictory. Statements (as found in the record) were made by residents in the area of the stream on record that it does run dry and the pond does not discharge except in flooding.

23. We find after review of all the evidence presented that the developer failed to show that the proposed sewage treatment plant which will discharge into a stream which runs dry and leads into a pond that does not discharge [is] feasible.

Report of the Supervisors, p. 14.

Further, in its Conclusions of Law, the Board stated:

The evidence before the Board of Supervisors is sufficiently deficient in showing the feasibility of the proposed sanitary waste disposal system.

Report of the Supervisors, p. 14.

The Developer challenges these Findings of Fact as an abuse of discretion and the Conclusion of Law as erroneous. The Developer argues that, on the contrary, "[t]he feasibility of Appellant's proposed sanitary waste disposal system was established by competent and relevant evidence by the Appellant's engineer and the [Pennsylvania] Department of Environmental Resources...[and] [t]here was no relevant and competent contrary evidence whatsoever." Appellant's Notice of Appeal, p. 3. We disagree.

The threshold issue here is the meaning of the term "feasibility" as that term is contemplated in the Act. Our independent research has revealed that neither the Act nor any Pennsylvania appellate case law provide a definition of that term to guide us. We are, therefore, guided by the polestar principle that, where a statutory term is not defined, we must look to the common and approved usage of that term. 1 Pa.C.S.A. Section 1903; *Commonwealth v. Stanley*, 498 Pa. 326, 446 A.2d 583 (1982).

Black's Law Dictionary defines the term feasible, the root of feasibility, as "[c]apable of being done, executed, or affected or accomplished. Reasonable assurance of success." *BLACK'S LAW DICTIONARY*, p. 549 (Fifth Edition, 1979). Feasible is also defined, *inter alia*, as "[c]apable of being utilized or dealt with successfully; suitable." *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, p. 480 (1971).

An Oregon court, in determining whether to grant preliminary approval to a Planned Unit Development has defined the term feasibility to mean more than possibility from a technical engineering perspective. *Meyer v. City of Portland*, 67 Or.App. 274, 678 P.2d 741 (1984). Instead, feasibility means that there is substantial evidence supporting a finding that the solution to certain problems posed by a project are possible, likely and reasonably certain to succeed. *Id.* Finding these definitions logical and relevant, we adopt them.

Here, to establish the feasibility of the proposed sewage system, the Developer relied on the testimony of John A. Burke, a registered professional engineer. Mr. Burke testified that the proposed sewage system was "feasible from an engineering standpoint". (N.T. 4/29/85, p. 47). However, as we have already concluded in this Opinion, feasibility as contemplated in the Act

means more than merely feasible from a technical engineering perspective. Rather, it means that solutions to problems posed by the project are reasonably likely to succeed. Therefore, to discover whether there was substantial evidence that the proposed sewage system was feasible, we must closely examine the remainder of Mr. Burke's testimony.

The Board permitted several nearby residents who attended the public hearing to question Mr. Burke. The record reveals the following:

BY MR. LES HERLING:

Q: . . . I live directly alongside the creek they are talking about pumping sewage down....So it's going to be a stagnant pond down there.

MR. BURKE: Doesn't it discharge from the pond?

Q: It doesn't have enough water in it. It's going to lay there. You are going to have a source of water laying there. If you want to take a ride and check the creek now, there is barely a trickle of water going through it now.

MR. BURKE: Yes, we will have to do that, certainly.

Q: That creek goes right into a pond, right at the Tannery.

MR. BURKE: I think I noticed that.

N.T. 4/29/85, pp. 64-65.

MR. BRADY: The creek you are speaking of does run into my pond and there is no outlet, only when you have a flood, because when the creek goes dry, the pond goes dry, so if your creek goes dry —

MR. BURKE: Right now, isn't there some discharge out of that pond?

MR. BRADY: No.

• • •

MR. BURKE: Well, you could see the problems we would have with DER, getting this worked out, no doubt about it.

N.T. 4/29/85, pp. 69-71.

Mr. Burke's testimony indicates that he was not fully aware of the year round flow of the creek and the discharge from the pond. This lack of knowledge in this fundamental area seriously impaired his credibility as a witness and the Board could have rejected his testimony completely. The Board could have properly found that Mr. Burke had not fully investigated all the potential problems the proposed sewage treatment plant would pose and concluded that there was considerable doubt as to the likelihood of its success. Since the Developer relied on Mr. Burke's testimony to show that the proposed sewage system was feasible, the Board committed neither an error of law nor an abuse of discretion in concluding that the Developer had failed to present substantial evidence that the sewage system is feasible. Although the Developer also submitted into evidence a letter from D.E.R. (Applicant's Exhibit No. 6) which stated that the Developer's preliminary proposal was "acceptable", this letter specifically stated that any other state and local requirements had to be met. This letter did not support the Developer's contention that the sewage system was feasible.

The Developer contends that the Board erroneously relied on incompetent "testimony" from two area residents who attended the meeting and questioned Mr. Burke about the creek and pond. However, we need not reach any issue regarding the testimonial competence of the questions posed to the engineer by the residents because it is unnecessary to our disposition here. As the Board correctly stated, the testimony of Mr. Burke was "sufficiently deficient" without reference to any other testimony, competent or not. Mr. Burke's testimony, standing alone, simply failed to supply substantial evidence to support a finding that the creek was capable of handling the effluent discharged from the proposed sewage treatment plan.

Although we found no Pennsylvania appellate cases on point, there is language, albeit dicta, from the appellate courts which, in our view, supports our conclusion here. The instant case is factually similar to *Rees v. Board of Supervisors of Indiana Township*, recently addressed by our distinguished colleague, Administrative Judge Emil Narick, sitting in the Allegheny Court of Common Pleas. In that case, the Board denied the application for tentative approval of a Planned Unit Development because, *inter*

alia, "the proposed sewage disposal plant is not acceptable because of a serious question as to the flow of Rawlins Run Creek which is not deemed appropriate to accept the effluent". *Rees v. Board of Supervisors of Indiana Township*, _____Pa.Cmwlth. _____, 513 A.2d 584 (1986).

The Board's decision was appealed to the Court of Common Pleas. *Id.* However, after the filing of the appeal, the appellant and the Board negotiated an Agreement under which the Board would grant tentative approval provided certain conditions were met. *Id.* In light of this Agreement, Judge Narick opined:

> The only substantial objection cited by the Board in its decision to deny the application has been satisfied by one of the conditions set forth in the settlement agreement. *We agree with the Board that the testimony from residents indicating that the creek into which appellant planned to discharge effluents flows only intermittently during the summer months raised a question as to the feasibility of the private on-site sewage disposal system.* However, appellant has agreed to use the township's public sanitation system, rather than the proposed private system. We therefore need not decide whether possible problems with the adequacy of the private system would be grounds to sustain the denial of the application....

Rees v. Board of Supervisors of Indiana Township, 39 D. & C.3d 101, 102-103 (Allegheny Co. 1985). (emphasis ours)

On appeal, the Commonwealth Court stated:

> [W]e agree with the [trial court], that *aside from the sewage disposal issue*, the Board erred in determining that a PRD [Planned Residential Development] was not permitted in the location in question. (citations omitted). We likewise agree that the trial court was correct when it held that the Agreement satisfied the only *valid objection* to the PRD *(the matter of sewage disposal)* and properly held that the Agreement was legally sufficient to authorize approval of the PRD.

Rees v. Board of Supervisors of Indiana Township, _____ Pa. Cmwlth. _____, 513 A.2d 584, 586 (1986).

This language indicates that both the Court of Common Pleas of Allegheny County and the Commonwealth Court considered not feasible a sewage system which flowed into an intermittently dry creek. We find *Rees* to be apposite to the present case.

2. Preemption

The Developer also contends that the Board had no authority to deny tentative approval to the Development because

the field of sewage regulation has been preempted by the legislature's enactment of the Sewage Facilities Act nd the Clean Streams Law. In support of this contention, the Developer submitted a post-argument Memorandum of Law citing the Pennsylvania Supreme Court's recent Opinion in *Council of Middletown Township v. Benham*, _____Pa. _____, 523 A.2d 311 (1987). *Benham* is factually similar to the case at bar because it also dealt with an application for tentative approval of a Planned Unit Development. The Developer's interpretation of *Benham*, however, is clearly erroneous.

Benham specifically held that "the legislature's enactment of the Pennsylvania Sewage Facilities Act [Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. Sections 750.1 - 750.20]...and the provisions of the Clean Streams Law [Act of June 22, 1937, P.L. 1987, *as amended* 35 P.S. Section 691.1001] which deal with sewage systems have not wholly preempted these fields from local zoning regulations". *Id.* at ___, 523 A.2d at 312.

The *Benham* Court, specifically addressing the Sewage Facilities Act, concluded that "the legislature plainly intended to combine state and local power into a comprehensive regulatory scheme for sewage disposal". *Id.* at ___, 523 A.2d at 313. Further, although the Developer cites *Benham* for the principle that enactment of the Clean Streams Law has limited the powers of a municipality in the area of sewage disposal to certain specified ministerial tasks, such as, *inter alia*, inspection of sewage facilities (See Developer's Memorandum of Law, pp. 2-3), in our view, no portion of the *Benham* decision can be reasonably cited for this principle. Although the *Benham* Court included the Clean Streams Law in its "no preemption" holding, quoted *supra*, that Court specifically declined to further address that Law stating that it did "not believe that that law [was] germane to the preemption discussion". *Id.* at ____, 523 A.2d at 313, ftnote 6.

Benham makes undeniably clear that the legislature, in enacting both the Sewage Facilities Act and the Clean Streams Law, has not placed the field of sewage disposal regulation beyond the pale of local regulation. Indeed, *Benham* re-emphasizes that a local municipality's power to regulate in this field is part and parcel of the overall state legislative scheme.

3. Absence of ordinance

The Developer also argues that the lack of specific provisions in any Kidder Township ordinance as to the requirements a Developer must meet to show feasibility for a proposed sewage system means that only the standards of state agencies are applicable, and thus, if the sewage system is approved by the Department of Environmental Resources, the Board does not have the authority to undertake an independent determination of the feasibility of the sewage system. We disagree.

Article VII of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. Section 10701 *et seq.*, was enacted by the legislature to "encourage innovations in residential development". 53 P.S. Section 10701 Section 702 of that Act provides that "[t]he governing body of each municipality *may* enact, amend and repeal ordinances fixing standards and conditions for planned residential development". 53 P.S. Section 10702. (emphasis added).

Section 702, by its own unambiguous language, does not mandate that every municipality must enact an ordinance prescribing standards for granting tentative approval of an application for a Planned Unit Development. *Kaufman and Broad, Inc. v. Board of Supervisors of West Whiteland Township*, 20 Pa.Cmwlth. 116, 340 A.2d 909 (1975). The "creation of a PRD section in an ordinance is left to the discretion of the [municipality]" and "no one can compel their enactment". *Id.* at 122, 340 A.2d at 912. Instead, the Act merely prohibits a municipality, which chooses to enact such an ordinance, from imposing conditions on the grant of tentative approval which are inconsistent with those provided in the Act. See 53 P.S. Sections 10705, 10707.

Admittedly, Kidder Township does not have a specific ordinance promulgated under Article VII detailing the requisites for making a showing of feasibility of a proposed sewage disposal system, which makes this case one of first impression in this Commonwealth. However, contrary to the Developer's argument, in our view, it was not the legislature's intent in enacting Article VII to give a Developer, in the absence of such an ordinance,

carte blanche in meeting the statutory requirements for securing tentative approval. In this vein, we note that even where there is such an ordinance, and all the requirements contained therein have been met, a municipality may still deny tentative approval if it serves the public interest. See *Doran Investments v. Muhlenberg Township, supra.* Therefore, we hold that, even in the absence of an ordinance detailing the requirements for showing feasibility of a proposed sewage system under Section 702, a Developer must show the feasibility of a proposed sewage system by competent and relevant evidence before tentative approval can be granted to a Planned Unit Development. As we stated previously in this Opinion, the Developer failed to meet this burden in the instant case.

For the foregoing reasons, we enter the following

ORDER

AND NOW, this 19th day of June, 1987, it is hereby ORDERED and DECREED that the Appeal of Pocono Green, Inc. is DENIED and the Decision of the Board of Supervisors of Kidder Township, denying tentative approval to a Planned Unit Development is AFFIRMED.

Costs on Appellants.

BY THE COURT:

/s/ John P. Lavelle
P.J.

APPENDIX F

BEFORE THE SUPERVISORS OF KIDDER TOWNSHIP, CARBON COUNTY, PENNSYLVANIA

In re: Application for Tentative Approval of a Planned Unit Development known as "Pocono Green" by Pocono Green, Inc.

REPORT OF THE SUPERVISORS PURSUANT TO PENNSYLVANIA MUNICIPALITIES PLANNING CODE AND THE TOWNSHIP ZONING, SUBDIVISION AND LAND USE ORDINANCES AND THE TOWNSHIP COMPREHENSIVE PLAN

The following report is being submitted upon consideration of the entire record made in connection with the application for preliminary approval of the Planned Unit Development known as "Pocono Green". This record includes, inter alia, the application forms, plans, notes of testimony and exhibits offered at the public hearing on application for preliminary approval, duly advertised, and held on April 29, 1985.

The proposed development is in a R-2 zoning district and is situate on a total 88.769 acre tract. 51.016 acres are located in Kidder Township and 37.753 acres are located in East Side Borough. The development is located immediately south and west of Pocono Hershey Golf Course, which is west of Tannery Road (L.R. 13040) and south of U.S. Interstate I-80, and is situate between the Pocono Hershey Resort Golf Course, Commonwealth of Pennsylvania State Game Lands, and private individual owners. The plan encampasses four hundred sixty five (465) dwelling units consisting of two hundred (200) units Kidder Township and two

hundred and sixty-five (265) units in East Side Borough with various amenities for the residential users.

The Kidder Township Planning Commission, upon consideration and review, recommended tentative approval of the application subject to various conditions as listed in its letter dated April 22, 1985 (Township Exhibit No. 5).

FINDINGS OF FACT

Based upon the testimony and other evidence received at the public hearing, we enter the following Findings of Fact:

1. An application for preliminary approval of a Planned Unit Development known as "Pocono Green" was filed with Township of Kidder under the terms and provisions of the Pennsylvania Municipalities Planning Code (Pa. M.P.C.), Act of July 31, 1968, P.L. 805, Art. VII, Section 701, 53 P.S. 10701, et seq., as amended, the Kidder Township Subdivision and Land Development Ordinance, as amended, the Kidder Township Zoning Ordinance, as amended, and the Kidder Township Comprehensive Plan.

2. The application was made by the Developer, Pocono Green, Inc., as equitable owner of all land shown on the Development Plan and as the "land owner" as defined by the Pa. M.P.C., Section 107 (12).

3. The land which is the subject of this application is one (1) tract containing a total of 88.769 acres. 51.076 acres are located in Kidder Township and 37.753 acres are located in the East Side Borough. The tract is depicted on the Plan documents.

4. The application contained the following information as required by the Pa. M.P.C.;

A. The location, size and topography of the site;

B. The nature of the land owner's interest in the land proposed to be developed;

C. The density of the land use to be allo-

cated to parts of the site to be developed;

D. The location and size of the common open space being 29.98 acres throughout.

E. The entity proposed to own and maintain the common open space;

F. The use, approximate bulk and location of buildings and other structures which consist of low-rise units as defined by the Ordinance arranged in clustered design patterns;

G. Information on the feasibility of proposals for the disposition of sanitary waste and storm water;

H. The substance of grants of easements for public utilities;

I. The provisions for parking of vehicles;

J. The location and width of proposed streets and public ways;

K. A written statement by the land owner setting forth the reasons why, in its opinion, a PUD would be in the public interest and would be consistent with the comprehensive plan for the development of the municipality.

5. The application did not contain the following information as required by the Pa. M.P.C.:

A. Height of buildings;

B. Feasibility of proposals for energy conservation and effective utilization of renewable energy sources;

C. The required modifications of municipal land use regulations, although evidence in this regard was submitted at the public hearing on this matter.

6. A public hearing was held before the Kidder Township Board of Supervisors on April 29, 1983, in accordance with Pa. M.P.C., Section 708.

7. The applicant appeared, represented by counsel who entered his appearance of record for the land owner-applicant.

8. The following witnesses appeared for the applicant in support of the application:

A. James Rothstein, Esquire, President and principal owner of Pocono Green, Inc., said corporation being the developer and equitable land owner for the proposed development;

B. James Carr, of the Martin Organization, Philadelphia, Pennsylvania, architect and land planner;

C. John Burke, registered professional engineer and registered land surveyor of the firm Smith, Miller and Associates, Engineers and Architects of Kingston, Pennsylvania.

9. The following witnesses appeared for the Township with reference to the application:

A. Gary Sohosky, golf professional at the Hershey Pocono Resorts.

10. The development is consistent with the comprehensive plan for the development of Kidder Township in that the housing units, roads and utilities have been arranged with respect to the slope and recommended uses for the area, it being in an R-2 residential zone.

11. The Plan documents depart from the Kidder Township Subdivision and Land Development Ordinance (1971) and the Kidder Township Zoning Ordinance provisions (other than Article 4, Subsection 4.403 Use Class 14 - Planned Unit Development) as follows:

A. The rear set back requirement of thirty (30') feet as not been met. The Plan must show sufficient rear set back from the property lines as to not adversely effect adjacent property owners. This requirement would be a condition of any tentative preliminary plan approval;

B. The minimum lot characteristics for area serviced by central water and central sewer facilities is thirteen thousand (13,000) square feet with a minimum eighty (80') foot width. The Plan would convey only land area beneath the dwelling units and a minimal in front and rear. We find the adequate provision for common open space and recreational area on the Plan available to each dwelling unit to suffice for minimum lot requirements under the conventional zoning regulations;

C. The Plan depicting a main cul-de-sac

roadway violates the provisions for cul-de-sac streets under the Kidder Township Subdivision and Land Development Ordinance. We find this to create a serious problem for ingress and egress to the within development in the event it is blocked at any given point. In the instance of fire or other emergency, this situation could create a serious danger to life and property and thus would not be in the public interest. Any plan to be given tentative approval would have to provide an alternate roadway system for vehicular traffic other than the main roadway ending in a cul-de-sac as shown on the present plan.

12. The Kidder Township Zoning Ordinance, as amended, Article 4, Basic District Regulations: Section 4.300 Use Classes and Zoning Districts, Use Class 14 Planned Unit Development would apply in the present case. The P.U.D. meets the requirements of maximum land coverage by building of 20%, being 11.7% in this P.U.D. and land coverage by all development of 30%, being 27.4% in this P.U.D. The public recreation area requirement is three hundred (300) square feet per house unit and the development meets this requirement by providing three hundred fifty nine (359) square feet per dwelling unit.

13. In compliance with Article 4 of the Kidder Township Zoning Ordinance for Planned Unit Developments, we find from the evidence submitted that there is a sufficient market for the type, size and character of the development proposed.

14. Easements for electric, telephone and cable services will be provided by the regulated utilities in the normal and usual manner.

15. The Plan provides for adequate pedestrian and vehicular circulation facilities including roadways, driveways, sidewalks and landscaped areas, except for the portion of the entrance to the development which intersects the Pocono Hershey Resort Golf Course. We find that vehicular and/or pedestrian traffic in that vicinity is extremely hazardous because of the use made by patrons of the golf course driving golf balls and golf carts

across the main roadway. Any tentative approval would be subject to a condition that the developer make assurances to the Township that it will take whatever means are necessary to eliminate hazard to vehicular and/or pedestrian traffic using the main artery roadway into the development from Legislative Route 13040. The roads shown on the Plan are of the correct right-of-way and pavement width.

16. The purpose of common open space is to provide for separation of various clusters of houses, visual enjoyment, separation for circulation of air and light. a sense of privacy and to preserve as much of the natural terrain and tree growth as possible. The common open space also serves the purpose as a site for certain active recreational uses. We find that the recreational area located in Kidder Township but not adjacent to the development to be minimumly adequate to meet the recreational and common open space needs of development located in Kidder Township. The "Recreation Area C" as shown on the preliminary plan is far removed from Kidder Township. The common open space requirement of twenty-five (25%) percent for each residential district (common open space as defined by the Zoning Ordinance) has been met in Kidder Township.

A condition of any tentative preliminary plan approval would require compliance with common open space and density requirements of our Ordinance once recreational facilities and all parking spaces related thereto are specified on a plan.

17. All the common open space with the exception of water and sewer facilities will be owned by applicant and the plan covenants make provision for permanent maintenance and preservation of such common open space including recreation space. The developer has indicated that the common open space will be placed in a trust providing for permanent maintenance and preservation (Note: A trust agreement in its entirety must be satisfactory to the Supervisors before any final approval of any plan).

18. The plan proposes that all roads are to be paved. We find pertinent questions have been raised concerning the adequacy of surface drainage in the area of the entrance to the

development as well as adequacy to handle storm water erosion and dust formation throughout the entire development. These questions have not been satisfactorily answered at this time by developer's engineer. A complete erosion and sediment control plan would be a condition of any tentative preliminary approval of this plan. There has been no certification by applicant's engineer that the surface and subsurface conditions of development will not cause damage to property or life and this likewise would be a condition of any tentative preliminary plan approval.

19. The developer has shown clustered housing and all height requirements of the zoning ordinance will be met. There appears adequate light and air in proper building spacing.

20. The Plan shows a general commercial area. The specific use of that commercial area must be represented to the Township and fall within the Kidder Township Zoning Ordinance Article 4 Use Class 14 (k) Commercial Uses.

21. In accordance with Zoning Ordinance, Article 4,the Plan calls for natural features and existing trees to be preserved whenever possible.

22. Article 4 of the Kidder Township Zoning Ordinance provides there can be no habitation of any portion of the development until the residential use types are attached to a centralized water system and a centralized sewage disposal system. The Municipalities Planning Code indicates that municipalities shall determine the feasibility of proposals for the disposition of sanitary waste and storm water as being in the public interest. We find that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer.

An issue was raised at the public hearing that the stream into which the developer proposes an effluent discharge goes dry. A second issue was raised that said stream runs to a pond from which there is no discharge of water. The testimony of developer's engineer in addressing both of these issues is inconclusive and contradictory. Statements (as found in the record) were made by residents in the area of the stream on record that it does run dry and the pond does not discharge except in flooding.

23. We find after review of all evidence presented that the developer failed to show that the proposed sewage treatment plant which will discharge into a stream which runs dry and lead into a pond that does not discharge to be feasible.

24. The area designated for "support facilities" on the Plan is not owned by applicant and any tentative preliminary plan approval would be subject to written documents submitted for review by the Township allowing that area to be used for support facilities of the development in perpetuity.

25. Since the sewage disposal system is one system proposed for both East Side Borough and Kidder Township, with the sewage treatment plant to be located in Kidder Township, before there is any joint hookup it would be a condition of any preliminary approval that an agreement be reached between East Side Borough and Kidder Township (or if such an agreement is not made that a court has made a determination) as to the rights and responsibilities of each municipality in the event the utility established by the developer becomes defunct or is unable to properly operate the sewage treatment plant and system. Such requirement would be in accordance with the provisions of both the Borough Code and the Second Class Township Code.

26. The Plan suggests a centralized water system. Proof that the configuration of the system itself would be adequate to serve the development would be a condition of any tentative preliminary plan approval. Also, a hydrological study and any other reasonable proof the Township feels necessary would be required. Such evidence would indicate that the water table in the area, considering existing water use in that area, is sufficient to provide adequate water to the entire development (located in both East Side Borough and Kidder Township since wells are proposed in Kidder Township only). This water supply must be adequate to accommodate domestic water use, water for fire fighting, and water for the proper operation of the sewage treatment plan and sewage system proposed. In addition, certifications and permits from all appropri-

ate agencies as to the adequacy of the sewage disposal system and the water supply system (including any permit from the Delaware River Basin Authority) would be required prior to any final approval.

27. The proposed development is located between the Pocono Hershey Resort Golf Course and state game lands as well as other vacant land owned by private owners. The Township finds this development not out of character with the neighboring areas.

28. With respect to Article 4 of the Kidder Township Zoning Ordinance Use Class 14 Planned Unit Development, off-street parking is provided for by the Plan at a two-to-one ratio with each space to be ten feet by twenty feet (10' X 20') as required. We find certain parking areas too far removed from the respective housing units and would require their placement closer to the units in any plan approval.

29. The tax impact of the proposed development will not be adverse to the Township, School District or County and, in fact, should be a benefit.

30. We find the comments of the Township engineer in his letter of March 27, 1985 (Township Exhibit No. 4) to be well founded and would require compliance with those objections as a condition of any tentative preliminary plan approval.

31. We find from the evidence presented that serious questions exist as to the adequacy of the fire protection system presented. However, the system was represented by developer's engineer as being in compliance with the National Fire Protection Association standards. Since the entire system would be delineated in a final

plan submission, a condition of any tentative preliminary plan approval would require a certification from the National Fire Protection Association that the proposed fire system is in compliance with its Code requirements for the type of clustered housing shown on the development plan.

CONCLUSIONS OF LAW

The proposed planned unit development known as "Pocono Green" meets some of the criteria as set forth in Article VII of the Pennsylvania Municipalities Planning Code, the Kidder Township Comprehensive Plan, the Kidder Township Subdivision and Land Use Ordinance (1971), and the Kidder Township Zoning Ordinance specifically Section 4, Use Class 14, Planned Unit Development, as amended. However, there are certain criteria of that Act and Ordinances specified above that are not met and would be conditions, as previously discussed, of any tentative preliminary plan approval.

The evidence before the Board of Supervisors is sufficiently deficient in showing the feasibility of the proposed sanitary waste disposal system, being a stream discharge sewage treatment plant. A proposed system which discharges into a stream which often runs dry and leads into a pond with no discharge point is detrimental to the environment, the immediate residents of the area, and all residents of Kidder Township in general.

DECISION

It is decided that the preliminary plan of Pocono Green as submitted is rejected based on the foregoing Findings of Fact and Conclusions of Law with respect to a lack of showing of feasibility of the proposed sanitary waste disposal system.

Accordingly, the Township Secretary is directed to certify a copy of these Findings of Fact, Conclusions of Law and Decision and mail the same to the land owner.

Dated this 17th day of June, 1985.

KIDDER TOWNSHIP BOARD OF SUPERVISORS

By:/s/ Kenneth J. McGeehan
Kenneth J. McGeehan
Chairman

/s/ H. Elizabeth Davis
H. Elizabeth Davis

/s/ Charles Getz
Charles Getz